Supreme Court, U.S.
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In The

Supreme Court of the United States

FABRI-CENTERS OF AMERICA, INC.,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Circuit correctly held – in conflict with the established rule in other circuits – that the Fair Labor Standards Act, 29 U.S.C. § 207(h)(2), permits "extra compensation" remitted under 29 U.S.C. § 207(e)(5), (6), or (7) to be creditable against overtime liabilities arising under such Act, only on a workweek-by-workweek, or work period-by-work period basis?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Fabri-Centers of America, Inc. n/k/a Jo-Ann Stores, Inc. ("Fabri-Centers") was defendant in the District Court and appellee before the United States Court of Appeals for the Sixth Circuit. Jo-Ann Stores, Inc. is a for-profit publicly traded corporation. Petitioner is unaware of any publicly held company owning ten (10%) percent or more of its stock.

Respondent Elaine L. Chao is the Secretary of Labor for the United States Department of Labor ("the Secretary"). The Honorable Elaine L. Chao was substituted for her predecessor, the Honorable Alexis M. Herman, during the appellate proceedings pursuant to Fed. R. App. P. 43(c)(2). The Secretary of Labor was plaintiff before the District Court and appellant before the United States Court of Appeals for the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Fabri-Centers of America, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit reversing the District Court's grant of partial summary judgment is reported at 308 F.3d 580 and reprinted in the appendix ("App.") at 1a. The opinion of the District Court granting Fabri-Centers' motion for partial summary judgment is not reported and is reprinted at App. 28a.

JURISDICTION

The judgment of the Sixth Circuit was entered on October 17, 2002. App. 1a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 207(h) of the Fair Labor Standards Act of 1938 ("FLSA"), 52 Stat. 1063, 29 U.S.C. § 207(h), provides, in relevant part: "Extra compensation paid as described in paragraphs (5), (6) and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section".

Section 207(e) of the FLSA, 29 U.S.C. § 207(e)(5), (6), and (7) provides:

> (e) "Regular rate" defined
>
> As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include –
>
> * * *
>
> (5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;
>
> (6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;
>
> (7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to

> such employee under subsection (a) of this section), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

INTRODUCTION

This case examines the overtime-offsetting provision of the FLSA which was "enacted in response to the Supreme Court's decision in *Bay Ridge v. Aaron*, 334 U.S. 446 (1948)". App. 12a.

> Extra compensation paid as described in paragraphs (5), (6) and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

29 U.S.C. § 207(h)(2), Pub. L. 393 (1949). Despite its over fifty years' existence, this Court has not yet interpreted or applied the text of section 207(h). Neither has the Secretary: "The Secretary has not promulgated or published any regulations pertaining to this statutory provision". App. 19a.

This interpretive void has led to unacceptable "divergent case law", with "[o]ne line of case law support[ing] the Secretary's interpretation that premium credits allowed by § 207(h)(2) should be limited to the same workweek or work period in which these premiums were paid"[1], and

[1] *Howard v. City of Springfield*, 274 F.3d 1141, 1149 (7th Cir. 2001); *Nolan v. City of Chicago*, 125 F. Supp. 2d 324, 331-33 (N.D. Ill. 2000).

"[a]nother line of case law support[ing] [Petitioner's] interpretation" of the statute, permitting crediting against any and all FLSA overtime obligations[2]. App. 19-20a. As it now stands, "an employer in Illinois is restricted to premium credits within the same work period in which the premiums were paid" while "a federal employer, a Georgia employer, or, previously, a Michigan employer, could receive premium credits over a greater period of time than the same work period". App. 26a (Siler, SCJ., dissenting). This frustrates the FLSA, which was designed to enhance the free flow of commerce by ensuring that "[e]very industry wherever located in competition in interstate commerce, will have applied to it the same minimum wage and maximum-hour provisions." S. 2475, 75th Cong. 3rd Sess., 83 Cong. Rec. 9177 (1938) (statement of Sen. Walsh). Such a chaotic patchwork of regional law is exactly the scenario where the Secretary has successfully urged this Court to step in and stabilize the FLSA. *See, Secretary of Labor petition for certiorari, Brock v. Richland Shoe Co.*, 486 U.S. 128 (1988) ("This lack of [FLSA] uniformity subjects employers in similar circumstances to differing periods of liability solely on the basis of their location").

Even those circuits that have sided with the Secretary's interpretation of section 207(h) are terribly fractured in both their results and analyses. *Howard v. City of Springfield*, 274 F.3d 1141 (7th Cir. 2001) (Manion, J., dissenting); App. 26a (Siler, SCJ., dissenting). In fact, the concurrence in this case was so conflicted that although it

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[2] *Alexander v. United States*, 32 F.3d 1571, 1577 (Fed. Cir. 1994); *Kolheim v. Glynn County, Ga.*, 915 F.2d 1473, 1481 (11th Cir. 1990); *Abbey v. City of Jackson*, 883 F. Supp. 181, 186-187 (E.D. Mich. 1995).

leant its vote to the majority, it nonetheless conceded that the dissent "has merit". *Id.* 26a.

For its part, the Sixth Circuit ignored several decisions of this Court and settled interpretive canons, to arrive at a result that would produce "concomitant fairness to employees". App. 14a. Congress' carefully selected and varying tenses of the words used – "extra compensation *paid* . . . shall be *creditable* toward overtime compensation *payable*" – was largely skirted. *But see, United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of verb tense is significant in construing statutes"). Section 207(h) was cabined by a "workweek" qualifier borrowed from overtime sections of the FLSA, even though Congress expressed that the extra compensation-type payments authorized under section 207(h) "shall" have nothing at all to do with overtime calculations under the statute. 29 U.S.C. § 207(e)(5), (6), (7). A Ninth Circuit interpretive rule that "when legislators delete language, we may assume that they intended to eliminate the effect of the previous wording" (App. 15a) was summoned forth and elevated over clearly expressed legislative intent to the contrary. 95 Cong. Rec. 14876 (1949) (Senate Conf. Agreement on Pub. L. 393) ("[S]ections 7(d)(6), (7), and 7(g) *continue in effect* the provisions of section 7(e) of the present Act. . . . ")

Truth be told, the court below should have ended its textual sojourn once it concluded that the FLSA "is silent as to when 'extra compensation' credit may be used". App. 11-12a. The court instead fell victim to the "exactly backwards" reading that the Department of Labor has historically applied to the FLSA. *Christensen v. Harris Cty., Texas*, 529 U.S. 576, 588 (2000). The FLSA does not need to "*permit* an employer" to act in a certain fashion, but

instead must textually "*prohibit*" conduct that is claimed to run afoul of the Act. *Id.* (emphasis in original).

This Court should grant certiorari to resolve the multiple conflicts on the important and recurring question presented.

STATEMENT OF THE CASE

Because Fabri-Centers and the Secretary "prepared and filed a joint stipulation of the facts" the background is "undisputed", and the issue joined here is one of pure statutory interpretation and application. App. 4a. This dispute presents a unique opportunity to craft "compelling" precedent. Cf. *Hilton v. South Carolina Pub. Rail. Comm'n*, 502 U.S. 197, 205 (1991) ("*Stare decisis* is most compelling" where "a pure question of statutory construction" is involved).

Fabri-Centers is a nationwide retailer of fabrics, notions and crafts, and operates a combined warehouse and distribution center in Hudson, Ohio. App. 4a. In concert with the collective bargaining agent for its hourly-compensated warehouse workforce, the United Steelworkers of America, Local Union No. 48U, Fabri-Centers negotiated a compensation system designed to maximize employee earnings. While working in their assigned "home base", the warehouse workers were remitted a standard base rate as defined in their labor contract. App. 6a. If, however, the employees were required to venture outside of their home base, then they were paid under the greater of two separate wage formulas termed "average rate" or "bonus pay". *Id.*

The unionized warehouse workers also received what the bargaining parties referred to as "overtime" premiums whenever they worked more than 8 hours per day or Saturdays after completing 40 hours of work preceding such Saturday. App. 7a. These contractual "overtime" hours were compensated at a rate of 1.5 times the hourly home base rate, multiplied by the aggregate number of contractual "overtime" hours worked. *Id.* A special, enhanced contractual "overtime" rate of 2 times the employees' home base rate was remitted for all Sunday work hours. *Id.* As the court below correctly noted, these contractual "overtime" premiums "accrued regardless of whether employees worked [FLSA] overtime" and "were not required by the FLSA". App. 5a, 9a, n.4. The payments were, instead, "premiums in excess of FLSA standards". App. 9a, n.4.

Notwithstanding the collectively bargained origins of the Fabri-Centers warehouse compensation plan, the Secretary brought suit under section 17 of the FLSA on April 24, 1998. App. 3a. The suit asked to restrain the commission of FLSA overtime violations[3] because earnings remitted to employees as either "average rate", "bonus pay", or for downtime were not factored into the determination of that worker's "regular rate" of pay when calculating statutory FLSA overtime obligations. App. 8a. In the proceedings below, Fabri-Centers never challenged its technical violation of the FLSA in this regard since the statute requires the mathematical inclusion of "all remu-

[3] Section 7(a) of the FLSA requires employers in most industries to compensate workers at a rate not less than one and one-half times their "regular rate" of pay for all workweek hours in excess of forty. 29 U.S.C. § 207(a)(1).

neration" remitted to a worker unless statutorily excepted. 29 U.S.C. § 207(e). Instead, Fabri-Centers argued that it was entitled to a full and complete credit for all contractual "overtime" premiums which were contemporaneously issued to the warehouse workforce. App. 8a.

If correctly credited, the result would lead to collectively-bargained "overtime" premiums which in many instances would wholly eclipse the Secretary's quest for FLSA liabilities, as demonstrated from the following jointly stipulated examples:

Employee:	Calo
Week Ending:	6/07/97
Base Rate:	$5.05
Avg. Rate:	$11.40
Down Tm Rate:	$6.00

Base Earnings	28.25 hrs. x $5.05	=$142.66
"Overtime" Earnings	20.10 hrs. x $7.575	=$152.26
Downtime Earnings	1 hr. x $6.00	=$ 6.00
Average Earnings	2.75 hrs. x $11.40	$ 31.35
Bonus Earnings		$ 18.60
Total		$350.87

$350.87 less "premiums" already paid by Def.
(1/2 of $5.05 x 20.1 hrs. = $50.75) = $300.12
$300.12 ÷ 52.10 hrs. = $5.76 FLSA "regular rate."
½ x $5.76 x 12.10 FLSA overtime hrs. exceeding 40/week = $34.84 FLSA overtime allegedly owed.
$50.75 "premium" already paid – $34.85 FLSA allegedly owed = $15.90

Employee:	Lockard
Week Ending:	6/21/97
Base Rate:	$6.10
Avg. Rate:	$12.92
Down Tm Rate:	$6.10

Base Earnings 28.25 hrs. x $6.10	= $170.80
"Overtime" Earnings 8 hrs. x $9.15	= $ 73.20
Downtime Earnings 2 hrs. x $6.10	= $ 12.20
Average Earnings 2 hrs. x $12.92	$ 25.84
Bonus Earnings	$255.20
Total	$537.24

½ of $6.10 x. 8 hrs. = $24.40

> Since employee Lockard worked no FLSA overtime in the week ending 6/21/97, he has been paid $24.40 in "premiums" over and above statutory FLSA requirements.

Once sued, Fabri-Centers "sought to offset the [FLSA] overtime pay that was owed with the contract premiums that it had paid in excess of FLSA's requirements", while the Secretary claimed that the Company "was allowed a credit only for the premiums that were paid during the same workweek". App. 8a. Under the Secretary's proposition, Fabri-Centers would altogether forfeit contract premiums to the extent they exceeded workweek FLSA obligations. This interpretive discrepancy produced a $113,313.63 liability swing. App. 42a.

The District Court granted Fabri-Centers' motion for partial summary judgment. The Court's decision was "based upon the plain language of Section 207(h), existing case law, and the legislative history of § 207". App. 37a. Chief Judge Matia noted that the statute's "*shall be creditable*" language was barren of "any qualifying language". App. 37-38a (emphasis in original). The District Court also observed that "Congress could have specified a per workweek limitation in § 207(h) if it saw fit. As it stands, that language, and therefore that limitation, does

not exist in § 207(h)". *Id.* at 39-40a (citing *Abbey v. City of Jackson*, 883 F. Supp. 181 (E.D. Mich. 1995)).[4]

The Secretary appealed and a sharply divided panel of the Sixth Circuit reversed. App. 1a. The panel completely ignored this Court's most recent pronouncement on how the FLSA operates, *Christensen v. Harris Cty., Texas*, 529 U.S. 576 (2000). App. 1a, *passim*. The panel implied that § 207(h)'s original text supported Fabri-Centers' interpretation since it expressly provided that premium payments " . . . may be credited toward *any* premium compensation due" under the statute. App. 13a (quoting Pub. L. 177, 52 Stat. 1063 (1949)). The "any" term was, however, deleted by Congress later that same year when it added three more types of employer payments that did not have to be accounted for when calculating the overtime "regular rate". Pub. L. 393, 52 Stat. 1063 (1949). The court seized on a Ninth Circuit decision, which in turn invoked California state law, for the proposition that "[w]hen legislators delete language, we may assume that they intended to eliminate the effect of the previous wording". App. 15a (quoting *Stewart v. Ragland*, 934 F.2d 1033, 1037 n.6 (9th Cir. 1991)). This California presumption was simply belied by the crystal clear congressional intent under the FLSA.

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[4] In an ironic twist, the Sixth Circuit recognized the correctness of the District Court's rationale: " '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion' ". App. 15a (quoting *Russello v. United States*, 464 U.S. 16, 23-24 (1983)). The Sixth Circuit then instead mis-cited *Russello* for the proposition that Congress' deletion of a statutory term necessarily evidences an intent to eliminate that term's further effect. *Id.*

95 Cong. Rec. 14876 (1949) (Senate Conf. Agreement on Pub. L. 393) ("[S]ections 7(d)(6), (7), and 7(g) *continue in effect* the provisions of section 7(e) of the present Act. . . . ") (emphasis added).

The Sixth Circuit explained away the varied tense of the words used in section 207(h) by holding that while the term "payable" could "signify an obligation to pay at a future time", it just as easily might connote a "debt . . . payable at once". App. 16a. The Sixth Circuit, however, offered no explanation as to why Congress would juxtapose the rear-looking term "paid" with the seemingly forward-looking "payable" in the very same sentence. App. 1a, *passim*. Nor did the panel offer an explanation as to the forward-looking word "creditable" as contained in the statute. *Id.*

The upshot of the Sixth Circuit's opinion was that since FLSA overtime liability in the first instance is generally triggered by a workweek qualifier, and since the mathematical computation of overtime rates is regulatorily linked to the workweek, section 207(h) should be similarly corralled. App. 18-19a. The fact that § 207(h) unlinks an employer's premium payments from having anything whatsoever to do with overtime pay rates – rolling those payments out from the "regular rate" calculation and simultaneously permitting their unqualified crediting – was not addressed as part of the panel's holistic analysis. App. 17-19a.

Judge Eugene Siler, Jr., dissented. He reasoned that: "It is unfair for the Secretary of Labor to force an employer to pay the additional amount of $113,313.63 when the statute does not so provide, no regulation has ever been promulgated on the subject, and employers in other states

are allowed these premium credits". App. 26-27a. The dissent refused to allow the Secretary to gain advantage from her own inaction: "The Department of Labor has for more than ten years known that there was a dispute about the limitations of the premium credits, but it has chosen not to attempt to promulgate regulations which would have been given some deference under *Chevron U.S.A, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984)". *Id.* 27a.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE SHARPLY DIVIDED ON THE IMPORTANT AND RECURRING QUESTION WHETHER AN EMPLOYER'S NON-STATUTORY PREMIUM PAYMENTS ARE FULLY CREDITABLE AGAINST FLSA OVERTIME OBLIGATIONS

Both the majority and the dissent in this case noted the circuit conflict which presently exists, and the havoc that it wreaks on what is supposed to be a nationwide, uniform federal law:

> Given the silence in the statute as to when overtime compensation may be credited and a lack of an implementing regulation on this precise issue, it is perhaps not surprising that divergent case law has arisen. One line of case law supports the Secretary's interpretation that premium credits allowed by § 207(h)(2) should be limited to the same workweek or work period in which these premiums were paid. *See Howard v. City of Springfield*, 274 F.3d 1141, 1149 (7th Cir. 2001) (holding that employer may apply certain credits against overtime owed on a pay period by pay

> period basis); *Nolan v. City of Chicago*, 125 F. Supp. 2d 324, 331-33 (N.D. Ill. 2000) (holding that "the offsets should be calculated on a period by period basis"). Another line of case law supports FCA's interpretation. *See Alexander v. United States*, 32 F.3d 1571, 1577 (Fed. Cir. 1994) (noting that the "1931 Act pay [premium pay pursuant to subsections (5) and (6) of § 207(e)] is creditable toward any overtime compensation due under the FLSA"); *Kolheim v. Glynn County, Ga.*, 915 F.2d 1473, 1481 (11th Cir. 1990) (holding "that the county should be allowed to set-off all previously paid overtime premiums ... against overtime found to be due and owing during the damages phase of the trial"); *Abbey v. City of Jackson*, 883 F. Supp. 181 (E.D. Mich. 1995) (holding that premium payments for overtime hours may be used to offset all deficiencies in overtime under the FLSA).
>
> * * *
>
> Thus, an employer in Illinois is restricted to premium credits within the same work period in which the premiums were paid. [citations omitted]. On the other hand, a federal employer, a Georgia employer, or, previously, a Michigan employer, could receive premium credits over a greater period of time than the same work period. [citations omitted].

App. 19-20a, 26a (Clay, J., majority; Siler, SCJ., dissenting).

Not only are the circuits torn in their results, but the analytical roads traveled by the courts and judges take markedly different paths. Those siding with Petitioner's argument that the FLSA's crediting proviso is unqualified have noted the absence of any limiting language or intent

in section 207(h). App. 27a. ("[T]he statute does not so provide [a workweek limitation]") (Siler, SCJ.); *Howard v. City of Springfield*, 274 F.3d 1141, 1149 (7th Cir. 2001) ("Neither the provisions of sec. 207(h)(2) of the FLSA, nor its accompanying regulations, require such a limitation") (Manion, J., dissenting); *Abbey v. City of Jackson*, 883 F. Supp. 181, 187 (E.D. Mich. 1995) ("There is a clear congressional intent to allow an employer to offset premium rates of pay against overtime owed"); *Kolheim v. Glynn County, Ga.*, 915 F.2d 1473, 1481 (11th Cir. 1990) ("All" premiums may be offset). This analysis remains faithful to this Court's recent opinion about how the FLSA works. *See, Christensen v. Harris Cty., Texas*, 529 U.S. 576, 588 (2000) ("Unless the FLSA *prohibits* respondents from adopting its policy, petitioners cannot show that [the employer] has violated the FLSA. And the FLSA contains no such prohibition").

The circuits agreeing with the Secretary have not even bothered to mention *Christensen*, and have instead professed to have set upon a course of reading the FLSA "as a whole". *Howard v. City of Springfield*, 274 F.3d 1141, 1148 (7th Cir. 2001) ("The credit provision must be read in the context of the statute as a whole. . . . "); App. 17a ("An analysis of the FLSA as a whole . . . favors the Secretary's view"). Additionally, both the Seventh Circuit and the Sixth Circuit here placed reliance on a Fourth Circuit decision that admittedly "was decided before § 207(h) was enacted in 1949". App. 23a (citing and quoting *Roland Elec. Co. v. Black*, 163 F.2d 417 (4th Cir. 1947)); *Howard v. City of Springfield*, 274 F.3d 1141, 1147 (7th Cir. 2001) (citing *Roland*). It borders on the Kafkaesque to suggest that *Roland*, acting years before § 207(h)'s passage, had

somehow properly interpreted its terms or provided the substantive legal tools for doing so.

Moreover, the Sixth Circuit's holistic approach to the FLSA only works where "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217 (2001) (GINSBURG, J.) (quoting *United Sav. Assn. of Tex. v. Timbers of Inwood Forest*, 484 U.S. 365, 371 (1988) (SCALIA, J.)). That's not the case here. The workweek serves but two purposes under the FLSA. First, by statute, it is the line of demarcation for determining when the 40 hour threshold has been exceeded, and time and one-half compensation must begin. 29 U.S.C. § 207(a). Second, the Secretary by regulation has adopted the workweek as the time period for aggregating a worker's earnings, so that their time and one-half overtime rate can then be calculated. 29 C.F.R. § 778.109. The contractual premiums sought to be credited here have nothing to do with either purpose. To the contrary, Congress directed not only that such premiums can be FLSA-offset, but also that they are to be rolled out of the employees' workweek remuneration for purposes of determining their "regular rate". 29 U.S.C. § 207(e)(5), (6), (7). This congressional disconnect was not even mentioned by the Sixth or Seventh circuits as part of their "as a whole" analysis.

The Secretary herself has declared these premiums to be "statutory exclusions". 29 C.F.R. § 778.108. It defies logic to suggest that an *exclusion* is nonetheless *covered* by an Act, and thus the Secretary's desire to fit exemptions under the FLSA into a workweek prophylaxis has not previously met success. *Marshall v. Western Union Tele. Co.*, 621 F.2d 1246, 1250-1251 (3rd Cir. 1980) (FLSA

exemption for managerial employees not limited to work-week analysis).

In any event, the fact that the circuits are currently splintered in their analytical approaches means that it is unlikely consensus will ever be obtained without this Court's intervention. *See,* S. Ct. Rule 10(a); *Braxton v. United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals"). This decisional divergence strikes at the very heart of the FLSA, the passage of which sought to guarantee that "every industry wherever located in competition in interstate commerce, will have applied to it the same minimum wage and maximum-hour provisions". S. 2475, 75th Cong. 3d Sess., 83 Cong. Rec. 9177 (1938) (statement of Sen. Walsh). The Secretary would have to concur that this lack of FLSA uniformity is a compelling reason for this Court's intervention. *See, Secretary of Labor petition for certiorari, Brock v. Richland Shoe Co.*, 486 U.S. 128 (1988).

II. THE DECISION BELOW CONFLICTS WITH MULTIPLE DECISIONS FROM THIS COURT

Christensen was not the only one of this Court's precedents that the Sixth Circuit chose to ignore. *First*, by not paying keen attention to all of the word tenses in § 207(h), the Sixth Circuit ran afoul of this Court's decision in *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of verb tense is significant in construing statutes"). *Second*, by reaching out to a California construction canon that when a legislature eliminates words from an enactment it must inexorably signal a change to

the statute's underlying intent, the court violated the basic tenet: "If the intent of Congress is clear, that is the end of the matter". *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Here, Congress' intent was quite clear. *Third*, by examining the statute through the lens of "concomitant employee fairness", the court below ran afoul of *United States v. Johnson*, 481 U.S. 681, n.9 (1987) (" 'Fairness' provides no more justification for . . . line draw[ing] . . ."). These additional conflicts provide a strong alternative basis for granting this petition. *See,* S. Ct. Rule 10(c) (one of the principal considerations governing the exercise of certiorari jurisdiction is whether a court of appeals "has decided an important question in a way that conflicts with the relevant decisions of this Court").

The tense of the words used by Congress has always played a part in this Court's construction of a statute. *United States v. American Sugar Co.*, 202 U.S. 563, 579 (1906) ("Future time and past time are directly opposite, and by no inadvertence or intention can we believe or suppose that Congress, having in mind and purpose the distinction between the past and the future, should use language that expressed the one when it meant to provide for the other"); *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999) (relying on Congress' use of "present indicative verb form" under Americans With Disabilities Act). The statute here seems clear enough:

> Extra compensation *paid* . . . shall be *creditable* toward overtime compensation *payable*. . . .

29 U.S.C. § 207(h) (emphasis added). If, as contended by the Secretary, extra compensation crediting can only occur within a workweek, and then only to the extent such

crediting is equal to or lesser than that particular work-week's FLSA overtime compensation, Congress would have instead used a uniform past tense throughout the statute:

> Extra compensation paid . . . shall be credited toward overtime compensation paid. . . .

The Sixth Circuit was able to offer an arguably plausible reading of the term "payable". App. 16a.[5] The court below, however, had no apparent explanation for Congress' use of the equally forward-looking term "creditable", or why Congress would attribute a historical connotation to the word "payable" after having already used the more clear term "paid" in the same sentence.

The Sixth Circuit's struggle to divine legislative intent is even more at odds with this Court's rulings. When originally enacted, section 207(h) read as follows:

> [E]xtra compensation provided by such premium rate shall not be deemed a part of the regular rate at which the employee is employed and may be credited toward *any* premium compensation due him under this section for overtime work.

H.R. 858, 81st Cong. 1st Sess., 95 Cong. Rec. 1311, *reprinted in* 1949 U.S. Code Cong. & Ad. News, p. 441 (emphasis added). The sweep of the crediting proviso " . . .

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[5] Although possible, the Sixth Circuit's ascribed meaning of the term "payable" was certainly not the only one. *Hughes v. IRS*, 62 F. Supp. 2d 796 (E.D.N.Y. 1999); *Coutts v. Wisc. Retirement Bd.*, 562 N.W. 2d 917 (1997) (both holding that "payable" applies to future payments, not those already paid). The sovereign seems to vacillate on the meaning of "payable" depending on the result to be achieved. *Hughes*, 62 F. Supp. 2d at 800.

toward any premium compensation due" under the Act, was not random. Congressional debate confirms this. H.R. 858, 81st Cong. 1st Sess., 95 Cong. Rec. 1445 (1949) ("[extra compensation] may be credited toward *any* premium compensation due . . . under this section for overtime work") (statement of Rep. McConnell) (emphasis added); H.R. 858, 81st Cong. 1st Sess., 95 Cong. Rec. 9491 (1949) ("Furthermore, this premium compensation may be credited toward *any* overtime compensation due under the Fair Labor Standards Act") (statement of Rep. Werdel) (emphasis added).

Later in 1949, Congress added other types of employer payments that did not have to be factored into an employee's FLSA "regular rate", and the text of the crediting proviso was changed to its current form. Pub. L. 393, 52 Stat. 1063 (1949). But Congress made it clear that it intended no change whatsoever to its earlier enacted crediting proviso:

> Section 7(g) provides for the crediting of such premiums toward statutory overtime compensation due for work in excess of 40 hours. In addition, section 7(d)(6), (7), and 7(g) continue in effect the provisions of section 7(e) of the present act (added by act of July 20, 1949, Public No. 177, 81st Cong. 1st Sess.) prescribing standards under which extra compensation provided by premium rates of time and one-half or more for work on certain days or at certain hours of the day or week could be excluded from the employee's regular rate and credited as an overtime premium.

95 Cong. Rec. 14876 (Oct. 18, 1949) (Senate Conference Agreement on Pub. L. 393). Thus, the Ninth Circuit's California-based canon of construction – "when legislators

delete language, we may assume that they intended to eliminate the effect of the previous wording" – has no place here. The Sixth Circuit elevated a tool to divine congressional intent into an end in and of itself. *Maine v. Taplin*, 247 A.2d 919, 922 (1968) ("Legislative purpose and intent when obvious must be carried out irrespective of rules of interpretation, as the intention of the law maker is the law").

Even the Sixth Circuit's decision to interpret § 207(h) against the backdrop of achieving "concomitant fairness to employees" (App. 14a) was not consistent with this Court's teachings. *See*, *United States v. Johnson*, 481 U.S. 681, n.9 (1987); *Mohasco v. Silver*, 447 U.S. 807, 826 (1980) ("balance struck by Congress" cannot be changed "by favoring one side or the other in matters of statutory construction"). In fact, the Secretary conceded below that § 207(h) was passed to benefit FLSA employers, not their employees. Thus, while the FLSA is undoubtedly "a statute designed to protect individual rights" (App. 10a), § 207(h) was designed to protect employer rights. The statute should have been read as written rather than to achieve an overarching objective foreign to the statute's purpose. And, even if "fairness" is an appropriate consideration here, most courts have concluded that that balance tips in favor of Fabri-Centers, not the Secretary:

> Forcing an employer, who has given a premium rate for pay for overtime to forego the receipt of credit and to pay additional overtime punishes the employer without regard to whether it was attempting to avoid its obligations to adequately compensate employees for extra hours worked. Plaintiffs have not pointed to any regulations, statutes, or current cases, which state that there is a congressional will to penalize an employer

> who inadvertently fails to follow the FLSA by, in effect, assessing civil money damages beyond those enunciated in 29 U.S.C. § 216(b).

Abbey v. City of Jackson, 883 F. Supp. 181, 187 (E.D. Mich. 1995). *Accord, Howard v. City of Springfield,* 274 F.3d 1141, 1150 (7th Cir. 2001) (Manion, J., dissenting); (App. 26a) (Siler, SCJ., dissenting).

III. THE CONFLICT AMONG THE CIRCUITS CONCERNS AN IMPORTANT AND RECURRING ISSUE THAT SHOULD BE DECIDED BY THIS COURT

The multiple conflicts identified by this petition provide a compelling basis for plenary review, but the need for certiorari is heightened still further by the important and recurring question presented against the backdrop of a statute that can ill afford non-uniformity. The absence of consensus is as much a problem for the Secretary as it is for Fabri-Centers. Petitioner is a nationwide employer which would naturally prefer not to treat employees differently for no other reason than they work in different states. Furthermore, as the law is presently constituted, the Secretary can take advantage of the very credits that she seeks to deny to Fabri-Centers. *See, Alexander v. United States*, 32 F. 3d 1571, 1577 (Fed. Cir. 1994).[6]

This chaotic situation exists in a setting where enforcement actions under the FLSA are on the rise. Nancy Montweiler, *Discrimination: Wage-Hour Class Actions*

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[6] Federal employees became covered by the FLSA through Pub. L. No. 93-259, 88 Stat. 55 (1974).

Surpassed EEO In Federal Court Last Year, Survey Shows, Daily Lab. Rep. (BNA), Mar. 22, 2002, at C-1. Since several states compel remittance of the premiums that FabriCenters benevolently negotiated with its collective bargaining partner, the issue is by its nature a recurring one. Alaska Stat. § 23.10.060; Cal. Labor Code § 510; Fla. Stat. § 448.01(2); Nev. Rev. Stat. § 608.018(1)(b); Rhode Island Stat. § 28-12-4.1(b).

The phraseology that the Sixth Circuit added to § 207(h) through the magic of interpretation was truly far-reaching. The text of the statute was effectively changed as follows:

> Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section, *providing any such credit occurs within the workweek in which the extra compensation is paid and does not exceed the overtime compensation paid within the workweek in which overtime compensation accrued, or in the case of an employee subject to subsection (j), providing any such credit occurs within the fourteen consecutive day period in which the extra compensation is paid and does not exceed the overtime compensation paid within the fourteen consecutive day period in which overtime compensation accrued, or in the case of an employee subject to subsection (k), providing any such credit occurs within the twenty-eight consecutive day period in which the extra compensation is paid and does not exceed the overtime compensation paid within the twenty-eight consecutive day period in which overtime compensation accrued.*

Courts, however, should be reluctant to read into a statute a limitation that does not appear on its face. *NLRB v. Kentucky River Comm. Care, Inc.*, 532 U.S. 706, 714 (2001). And, Congress' use of "shall" should have created a right "... impervious to judicial discretion". *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 2070 (2002).

This Court should grant review of the fractured decision below to ensure that the FLSA is administered in a uniform manner across the country.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2002 FED App. 0363P
(6th Cir.)
File Name: 02a0363p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Alexis M. Herman, Secretary of Labor, United States Department of Labor,	)	
Plaintiff-Appellant.	)	No. 01-3080
v.	)	
Fabri-Centers of America, Inc.,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 98-00970 – Paul R. Matia, Chief District Judge.

Argued: June 14, 2002

Decided and Filed: October 17, 2002

Before: SILER and CLAY, Circuit Judges; WILLIAMS, District Judge.*

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* The Honorable Glen M. Williams, Senior United States District Judge for the Western District of Virginia, sitting by designation.

COUNSEL

ARGUED: Leif Jorgenson, UNITED STATES DEPARTMENT OF LABOR, OFFICE OF THE SOLICITOR, Washington, D.C., for Appellant. Keith L. Pryatel, KASTNER, WESTMAN & WILKINS, Akron, Ohio, for Appellee. **ON BRIEF:** Leif Jorgenson, Paul Frieden, UNITED STATES DEPARTMENT OF LABOR, OFFICE OF THE SOLICITOR, Washington, D.C., for Appellant. Keith L. Pryatel, Harley M. Kastner, KASTNER, WESTMAN & WILKINS, Akron, Ohio, for Appellee.

CLAY, J., delivered the opinion of the court. WILLIAMS, D.J. (p. 23), delivered a separate opinion concurring in the result. SILER, J. (pp. 24-25), delivered a separate dissenting opinion.

OPINION

CLAY, Circuit Judge. Plaintiff, Alexis M. Herman, former Secretary of Labor of the United States Department of Labor ("the Secretary"), appeals from the judgment ordering Defendant, Fabri-Centers of America, Inc. ("FCA"), to pay $431,948.58 for its violations of sections 7, 11(c), 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 ("the FLSA"), 29 U.S.C. § 207(a)(1), § 211(c), § 215(a)(2) and § 215(a)(5).[1] The district court determined

[1] Pursuant to Fed. R. App. P. 43(c)(2), Elaine L. Chao, the current Secretary of Labor, is automatically substituted as the proper plaintiff in this case.

that FCA owed the aggregate amount of $545,262.21 for its overtime liabilities under the FLSA, but that FCA was entitled to an "extra compensation" credit of $113,313.63 pursuant to 29 U.S.C. § 207(h)(2). On appeal, the Secretary challenges the district court's award of the extra compensation credit to FCA. For the reasons set forth below, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** for further proceedings consistent with this opinion.

BACKGROUND

A. Procedural History

On April 24, 1998, the Secretary brought this enforcement action under section 17 of the FLSA, 29 U.S.C. § 217, in the United States District Court for the Northern District of Ohio, to enjoin FCA and its chief executive officer, Alan Rosskamm, from violating sections 7, 11(c), 15(a)(2) and 15(a)(5) of the FLSA. In the complaint, the Secretary sought overtime liabilities on behalf of FCA's unionized warehouse employees. Section 7 requires employers to pay covered employees for hours worked longer than forty in a workweek at a rate not less than one and one-half times the regular rate at which they are employed. 29 U.S.C. § 207(a)(1). Section 11(c) requires covered employers to "make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him. . . ." 29 U.S.C. § 211(c). Under section 15(a)(2), it is unlawful for any person "to violate any of the provisions of section 206 or section 207 of this title." 29 U.S.C. § 215((a)(5)). Section 15(a)(5) makes it unlawful "to violate any of the provisions of section 211(c). . . ." 29

U.S.C. § 215(a)(5). On June 11, 1998, the Secretary voluntarily dismissed Rosskamm under Fed.R.Civ.P. 41(a)(1).

The parties then prepared and filed a joint stipulation of the facts on September 14, 1998. On October 2, 1998, the parties filed their respective motions for summary judgment under Fed.R.Civ.P. 56. The Secretary sought a determination of the amount of the overtime liabilities that FCA owed to the workers, while FCA, in its cross-motion, petitioned for extra compensation credit against any determined overtime liabilities under the FLSA.

The district court issued a memorandum opinion and order on September 29, 2000, granting in part the Secretary's Rule 56 motion and granting in part FCA's cross-motion for summary judgment. Pursuant to a joint stipulation, the aggregate amount of FLSA overtime that FCA was liable to pay was $545,262.21. However, the district court determined that FCA was entitled to an "extra compensation" credit of $113,313.63. Thus, the net amount that FCA owed as a result of the district court's order was $431,948.58. A final judgment incorporating the joint stipulation was entered on November 21, 2000. The Secretary filed a timely appeal.

B. Substantive History

The relevant facts are undisputed. FCA owns and operates various retail stores, principally under the names of Jo-Ann Fabrics and Crafts, Cloth World, New York Fabrics, and Jo-Ann, to sell fabrics, notions and crafts. It also operates a warehouse and distribution center for the retail sale of fabrics, crafts and notions at 5555 Darrow Road in Hudson, Ohio. Pursuant to the FLSA, FCA is an "enterprise engaged in commerce or the production of

goods for commerce" under 29 U.S.C. § 203(s)(1) and is an "employer" under 29 U.S.C. § 203(d). Thus, it is undisputed that FCA is subject to the provisions of the FLSA.

The district court succinctly explained the nature of dispute as follows:

> The gravamen of this action is FCA's calculation of overtime. Prior to renegotiating the collective bargaining agreement, overtime pay for FCA employees was based solely on their base rate of pay. Notwithstanding the other rates of pay available at FCA, all overtime hours were compensated at the lowest rate possible. It is undisputed, however, that FCA's compensation plan allowed employees to earn premiums in excess of FLSA standards. These premiums accrued regardless of whether employees worked overtime. Thus, the question at the heart of this matter is whether the premiums paid under the plan offset any alleged shortcomings in calculating overtime pay.
>
> Plaintiff, Alexis M. Herman, Secretary of Labor, United States Department of Labor ("DOL"), contends that the FLSA dictates that FCA incorporate all employee pay rates into the base rate (or regular rate) for overtime purposes. The DOL further contends that premiums earned by employees may only offset overtime due within the same workweek. In rebuttal, FCA argues that the premiums can offset the total overtime due. After spot investigations at FCA, the DOL brought this action on behalf of FCA employees to recover overtime compensation that is allegedly owed under the former compensation plan.

(J.A. at 18-19.)

Central to these questions was the compensation formula that FCA used to determine the wages of warehouse employees during the time period in dispute, April 1, 1996 to May 17, 1998.[2] The warehouse employees ("the employees") were represented by the United Steelworkers of America, ALF-CIO-CLC [sic] (Upholstery and Allied Industries Division), Local Union No. 48U.[3] The employees were assigned a job code that represented their home base within the Hudson, Ohio warehouse where the employees were typically assigned to perform their work. Under the collective bargaining agreement, the employees were paid a "base rate" when working at their primary location or home job codes in the Hudson, Ohio warehouse. Their "regular pay" was determined by multiplying their weekly in-home job hours worked times their hourly base rate.

For employees who worked outside of their home job codes, their "regular pay" was determined by the higher of one of two formulas. Under the first formula, if the calculated "average rate" resulted in compensation that was greater than the employees' non-home base hours multiplied by their hourly base rate plus "bonus pay," then the employees were entitled to compensation based upon their non-home base hours worked multiplied by their calculated "average rate." The employees' "average rate" was calculated by dividing the employees' aggregate earnings,

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[2] As the district court pointed out, FCA no longer uses this compensation formula, eliminating the policies challenged by the Secretary in the present appeal, when the collective bargaining agreement was amended on May 17, 1998.

[3] The warehouse employees in question did not include supervisors, sales representatives, part-time or clerical employees in the warehouse.

including "overtime pay," for a six-month period and dividing the aggregate amount by the aggregate number of hours worked by the employees, including overtime hours, for that six-month period. If the use of the "average rate" for the employees working outside of their home job code did not result in a higher figure, then their "regular pay" was determined by multiplying their hours worked times their hourly rate plus "bonus pay."

Under the second formula used for employees who performed work outside of their home job codes, the employees received "bonus pay." FCA determined "bonus pay" by using either (1) the units of merchandise completed at each bonus tier multiplied by a set bonus rate for each such tier, or (2) special bonuses calculated by the job identification. If the "average rate" for employees working outside their home job code did not result in a higher figure, then the wage equaled the product of hours worked multiplied by the base rate plus any "bonus pay." In other words, compensation equaled the number of hours worked times the base rate, to which "bonus pay" was added.

FCA's warehouse employees also were paid "overtime pay," which was calculated by the aggregate "overtime" hours multiplied by 1.5 times their hourly base rates. Employees received overtime pay when they worked more than eight hours per day, or when they worked Saturdays after working forty hours during the work week. Employees were paid twice their hourly base rates for all Sunday work hours. Employees also received "holiday pay," which was calculated by virtue of the number of holiday hours worked times the "average rate" for that employee. "Average rate," "bonus pay," "downtime pay" and "shift differentials" were not included in the hourly base rate for purposes of calculating overtime pay when employees

worked more than forty hours per work week. "Downtime pay" was calculated by multiplying the employees' downtime rate by their hourly downtime hours.

As the district court recognized, FCA did not contest the threshold issue of whether it violated the FLSA by calculating overtime payments using only the employees' base rate. As to this matter, the district court found that FCA violated the FLSA by failing to include the nondiscretionary bonuses, "average rate," and other "shift differentials" as part of the "regular rate." Thus, the district court held that the Secretary was entitled to a judgment as a matter of law on its claim that FCA's calculation of the "regular rate" for overtime purposes was in violation of the FLSA.

Instead, FCA's argument in the district court focused solely on whether it could credit the contract premiums paid to its employees against the overtime pay that was owed them. Specifically, FCA, in its cross-motion for summary judgment, sought to offset the overtime pay that was owed with the contract premiums that it had paid in excess of FLSA's requirements. In opposition, the Secretary claimed that under 29 U.S.C. § 207(h), FCA was allowed a credit only for the premiums that were paid during the same workweek. The district court summed up the dispute in the following terms: "FCA is claiming that all premiums are creditable regardless of the workweek they were paid, while the DOL contends that premiums can only be offset within the same workweek as the missed overtime."

In agreeing with FCA's argument, the district court, relying upon *Abbey v. City of Jackson*, 883 F.Supp. 181 (E.D. Mich. 1995), found that "[b]ased upon the plain

language of § 207, existing case law, and the legislative history of § 207 . . . [a]ll premium payments can be credited toward the total overtime owed." The district court specifically noted that there was no "qualifying language in the statute limiting credits on a workweek basis." The district court also stated that there was nothing in the language of § 207 or the Secretary's regulations that required it "to read a qualifier into clear statutory language." In granting judgment as a matter of law to FCA regarding its claim about crediting past premiums toward the overtime liability that it owed, the district court concluded: "Congress could have specified a per workweek limitation in § 207(h) if it saw fit. As it stands, that language, and therefore that limitation, does not exist in § 207(h), and the Court refuses to supply that limitation."

DISCUSSION

A. Issue and Standard of Review

The issue before this Court is whether FCA may use its contract premiums to offset overtime owed to its employees only within the same workweek as the missed overtime, as the Secretary contends, or against the total amount of overtime owed, as FCA maintains, under 29 U.S.C. § 207(h).[4] This Court reviews the district court's grant of summary judgment *de novo*. *Herman v. Collis Foods,* 176 F.3d 912, 916 (6th Cir. 1999). When the facts of

[4] As the district court noted, it was undisputed that FCA's compensation plan allowed employees to earn premiums in excess of FLSA standards. The contract premiums were apparently paid pursuant to a collective bargaining agreement and were not required by the FLSA.

a case are undisputed, and the sole issue before this Court is a legal question, the legal question is reviewed *de novo*. *Id.* In this case, the district court erred in granting FCA's cross-motion for summary judgment by finding that FCA was entitled under 29 U.S.C. § 207(h)(2) to apply contract premiums as credit against the total overtime owed.

B. Analysis

In deciding this case, we are guided by the principles of statutory interpretation. When interpreting a statute, this Court must begin with its plain language, and may resort to a review of congressional intent or legislative history only when the language of the statute is not clear. *In re Comshare, Inc.*, 183 F.3d 542, 549 (6th Cir. 1999) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). "Where the literal language of the statute does not conclusively reveal legislative intent, the courts must look beyond literal meaning, analyzing the provision in context with the whole." *In re Arnett*, 731 F.2d 358, 361 (6th Cir. 1984) (citing *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)). Further, we note that the FLSA, as a statute designed to protect individual rights, is "remedial and humanitarian in purpose," and "must not be interpreted or applied in a narrow, grudging manner." *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944); *see also Lambert v. Ackerley*, 180 F.3d 997, 1003 (9th Cir. 1999).

Section 207(h) addresses extra compensation creditable toward overtime compensation as follows:

> (1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages

required under section 6 or overtime compensation required under this section.

(2) *Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.*

29 U.S.C. § 207(h)(1) and (2) (emphasis added).[5] As the Secretary points out, the statute is silent as to when "extra

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[5] Paragraphs (5), (6), and (7) of § 207(e) provide as follows:

e) "Regular rate" defined

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include –

* * *

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek) applicable to such employee under subsection (a) of this section, where such premium rate is

(Continued on following page)

compensation" credit may be used, and, thus, the plain language of the statute does not determine whether FCA may apply its contract premiums only in the same workweek or work period in which the overtime liability was incurred, or whether it may use it against the total overtime deficiency. Moreover, as the parties recognize, no Department of Labor ("DOL") regulation specifically addresses the precise issue in this case. Thus, in determining whether § 207(h)(2) permits FCA to use its contract premiums to offset overtime owed to its employees, we need to examine the text of the statutory provision in light of the relevant legislative history and in context with the FLSA as a whole and its implementing regulations.

1. The legislative history of § 207(h)(2)

A review of the relevant legislative history tends to favor the Secretary's position that the statute should be interpreted to include a workweek or work period restriction. As the parties acknowledge, 29 U.S.C. § 207(e)(5), (6) and (7), and § 207(h) were enacted in response to the Supreme Court's decision in *Bay Ridge v. Aaron*, 334 U.S. 446 (1948). In *Bay Ridge*, the Court, interpreting a contract between stevedoring companies and the International Longshoremen's Association ("ILA"), required the employers to pay statutory overtime compensation that

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not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek[.]

29 U.S.C. § 207(e)(5), (6) and (7). As FCA acknowledges, there is no dispute that its premium payments fit within 29 U.S.C. § 207(e)(5), (6) and (7).

was calculated by including certain contractual premiums in the regular rate, and thus pay "overtime on overtime." As a result of *Bay Ridge,* Congress responded by passing Public Law 177, which contained language that allowed credit for contractual premiums paid by employers "toward *any* premium compensation due" under section 7 of the Act. Fair Labor Standards Act of 1938, Pub.L. No. 177, § 207, 52 Stat. 1063 (1949) (emphasis added).

As the parties acknowledge, the life of the "toward *any* premium compensation due" language of Public Law 177 was short-lived. Soon thereafter, Congress, through Public Law 81-393, passed extensive revisions of the FLSA, creating the present statutory language found at § 207(h)(2), which allows credit for contractual premiums "toward overtime compensation payable pursuant to this section." 29 U.S.C. § 207(h)(2). As the Secretary points out, the problem of employees receiving statutory overtime that included contractual premiums, as required by *Bay Ridge,* was solved by the enactment of sections 7(e)(5), (6) and (7), which explicitly reference the workweek. Thus, when the FLSA was amended in 1949, 29 U.S.C. §§ 207(e)(5), (6), and (7) excluded certain premium payments from the computation of overtime, while 29 U.S.C. § 207(h) allowed those payments to be credited against FLSA overtime. The Secretary notes:

> It was considered unfair to require the inclusion of contractual premiums not required by the Act in the regular rate of pay for overtime purposes, thereby making the employer pay "overtime on overtime." *See* Senate. Rep. No. 402, 81st. Cong., 2nd. Sess. (1949). It was also considered fair to employers to give them credit for certain contractual premiums they paid against the statutory overtime they might owe. *Id.* As described above,

> however, there can only be concomitant fairness to employees if the crediting permitted by section 7(h) is limited to the workweek in which the premiums are paid.

Plaintiff's Br. at 16-17.

In view of these revisions of the FLSA, the Secretary reasons that it makes sense to interpret the related enactment of section 7(h) to allow for crediting on that very same workweek basis since "the problem resulting from *Bay Ridge, supra.*, which section 7(h)(2) was enacted to remedy, involved employees who routinely received a contractual premium and worked statutory overtime *in the same week.*" Plaintiff's Reply Br. at 4-5 (emphasis in original). In further support of its interpretation of § 207(h)(2) as containing a workweek qualification, the Secretary also cites to Senate Report 81-402, at 4 (1949), which references paragraphs 13, 69, 70 of the Wage and Hour Interpretative Bulletin No. 4, which contain examples regarding the crediting of contractual premiums against statutory overtime owed to employees by using the seven-day workweek as the standard reference point. Accordingly, it would appear that the legislative history of the statute supports the notion that the workweek or work period is central to an understanding of § 207(h)(2).

FCA has a completely different understanding of the Congressional response in 1949 to *Bay Ridge*. According to FCA, the Congressional debates confirmed the view that contract premium payments may be credited against any overtime compensation due under the Act. FCA argues that the present statutory language is merely "somewhat watered down from its predecessor 'credited toward any premium,'" and represents only a "minor shift in text." Defendant's Br. at 21-22. On FCA's view, the present

statutory language of § 207(h)(2) is merely a repackaged version of the earlier statutory language, and that "the ghost of the . . . 'credited toward any premium compensation due' [language] continues to haunt the statute's intent." Defendant's Br. at 23.

However, FCA's statutory construction of § 207(h)(2) is at variance with the applicable principles of statutory interpretation. As the Secretary correctly points out, the fact that Congress deleted "any" in amending the statute means that it presumed that the omitted term was not intended to have any effect on the present version of the statute. *See Russello v. United States,* 464 U.S. 16, 23-24 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. . . . We would not presume to ascribe this difference to a simple mistake in draftsmanship.") (internal quotation marks omitted); *see also Petrey v. City of Toledo,* 246 F.3d 548, 561 (6th Cir. 2001). Here, Congress specifically removed the language in question that it had inserted in the previous version before the enactment of the revised statute. This provides even greater support for the presumption that the removed language was not intended to have any effect on the meaning of the amended statute. *See Stewart v. Ragland,* 934 F.2d 1033, 1037 n.6 (9th Cir. 1991) ("When legislators delete language, we may assume that they intended to eliminate the effect of the previous wording.").

Nevertheless, FCA maintains that the statute clearly allows "extra compensation" to be credited against any overtime due under the FLSA because the "carefully selected and varying tenses of the verbs used under

section 207(h)(2) also betray Congress' clear intent." Defendant's Br. at 26. Specifically, FCA argues that "while the statute uses the rear-looking, past tense 'paid' to describe the extra compensation to be offset, it in marked contrast uses the forward-looking verbs 'creditable' and 'payable' to describe the crux of the benefit legislated for employers." Defendant's Br. at 26. According to FCA, "[t]he clear message sent by the word 'payable' is that it applies to future payments, not those already paid." Defendant's Br. at 27.

FCA's explanation as to Congress' linguistic intent falters in this respect because the term "payable" is not customarily understood to relate to future payments. "Payable" is defined in Black's Law Dictionary:

> Capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable. A sum of money is said to be payable when a person is under an obligation to pay it. *Payable may therefore signify an obligation to pay at a future time, but, when used without qualification, the term normally means that the debt is payable at once, as opposed to "owing."*

Black's Law Dictionary 1128 (6th ed.1990) (emphasis added);[6] *see also Trujillo v. Cyprus Amax Minerals Co. Ret. Plan Comm.*, 203 F.3d 733, 737 (10th Cir. 2000) (noting that the term "payable" under the Employee Retirement Income Security Act "means '[c]apable of being paid;

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[6] Similarly, "payable" is defined in Black's Law Dictionary 1150 (7th ed. 1999) as follows: "(Of a sum of money or a negotiable instrument) that is to be paid. • An amount may be payable without being due. Debts are commonly payable long before they fall due."

suitable to be paid; admitting or demanding payment; justly due; legally enforceable' ") (quoting Black's Law Dictionary 1128 (6th ed.1990)); *In re Ripley*, 926 F.2d 440, 444 (5th Cir. 1991) (citing Black's Law Dictionary to interpret "payable" in section 1305(a)(1) of the Bankruptcy Code to mean that "taxes that have 'become payable' are those that must be paid now").[7] Because the term "payable" is not customarily understood to apply to future payments, we reject FCA's argument that "payable," as found in § 207(h)(2), evinces Congress' intent to allow "extra compensation" to be credited against any overtime liability due under the FLSA.

2. The FLSA as a whole and its implementing regulations

An analysis of the FLSA as a whole and its implementing regulations also favors the Secretary's view that § 207(h)(2) should be interpreted to include a workweek or work period restriction. As the Secretary points out, the FLSA as a whole and the DOL's implementing regulations of the Act highlight the primacy of the workweek concept.

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[7] *See also Johnson v. Methorst*, 110 F.3d 1313, 1317 n.3 (8th Cir. 1997) (noting that "Webster's New World Dictionary (2d ed. 1984) defines 'payable' in part as '[r]equiring payment on a certain date: DUE' "); *Cathey v. United States*, 35 F. Supp. 2d 518, 520 (S.D. Tex. 1998) (noting that "English dictionaries agree on the meaning of payable, defining it to mean *inter alia* '[t]hat may, can, or should be paid,' 'due,' or 'capable of being paid' "); *Royal Indemnity Co. v. Wyckoff Heights Hosp.*, 953 F. Supp. 460, 466 (E.D. N.Y. 1996) ("Although 'payable' might mean a future obligation in some circumstances, as is used in the Policy, the only reasonable understanding is that it adds to the meaning of 'paid' by including a sum which is enforceably due or obligated, but not yet actually remitted.").

First, various provisions of the FLSA explicitly note the primacy of the workweek. *See* 29 U.S.C. § 207(a)(1) ("Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce . . . for a *workweek* longer than forty hours . . .") (emphasis added); 29 U.S.C. § 207(l) ("No employer shall employ any employee in domestic service . . . for a *workweek* longer than forty hours . . .") (emphasis added); 29 U.S.C. § 207(m) ("For a period or periods of not more than fourteen *workweeks* in the aggregate in any calendar year, any employer may employ any employee [in the tobacco industry]") (emphasis added).

In addition, the Department of Labor ("DOL") regulations implementing the Act support prompt payment of overtime, suggesting that the premiums should be credited within the same workweek in which they were paid. Specifically, 29 C.F.R. § 778.106 provides in pertinent part:

> The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made.

29 C.F.R. § 778.106. *See Reich v. Interstate Brands Corp.*, 57 F.3d 574, 576 (7th Cir. 1995) (noting the "general rule is

that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends") (quoting 29 C.F.R. § 778.106); *see also* 29 C.F.R. § 778.103 (directing employers to pay overtime due on a weekly basis); 29 C.F.R. § 778.104 (stating that an employer cannot average the number of hours worked over two weeks in order to avoid paying overtime); 29 C.F.R. § 778.202(c) (finding that credits may be given for daily compensation "against the overtime compensation which is due under the statute for hours in excess of 40 in that workweek").

Thus, while the plain language of § 207(h)(2) does not speak directly to the present issue and while the Secretary has not promulgated or published any regulation pertaining to this statutory provision, these other provisions in the FLSA and its implementing regulations lend support to the Secretary's position that premium credits allowed by § 207(h)(2) should be limited to the same workweek or work period in which these premiums were paid.

3. Case law interpreting § 207(h)(2)

Given the silence in the statute as to when overtime compensation may be credited and the lack of an implementing regulation on this precise issue, it is perhaps not surprising that divergent case law has arisen. One line of case law supports the Secretary's interpretation that premium credits allowed by § 207(h)(2) should be limited to the same workweek or work period in which these premiums were paid. *See Howard v. City of Springfield,* 274 F.3d. 1141, 1149 (7th Cir. 2001) (holding that employer may apply certain credits against overtime owed on a pay period by pay period basis); *Nolan v. City of Chicago,* 125

F. Supp.2d 324, 331-33 (N.D. Ill. 2000) (holding that "the offsets should be calculated on a period by period basis"). Another line of case law supports FCA's interpretation. *See Alexander v. United States*, 32 F.3d 1571, 1577 (Fed. Cir. 1994) (noting that the "1931 Act pay [premium pay pursuant to subsections (5) and (6) of § 207(e)] is creditable toward any overtime compensation due under the FLSA"); *Kohlheim v. Glynn County, Ga.*, 915 F.2d 1473, 1481 (11th Cir. 1990) (holding "that the county should be allowed to set-off all previously paid overtime premiums . . . against overtime found to be due and owing during the damages phase of the trial"); *Abbey v. City of Jackson*, 883 F. Supp. 181 (E.D. Mich. 1995) (holding that premium payments for overtime hours may be used to offset all deficiencies in overtime under the FLSA).

Notwithstanding, the case law supporting the Secretary's interpretation appears to be more persuasive. Specifically, as noted by the Seventh Circuit in *Howard*, allowing the employer to use premiums to offset the total liability is inconsistent with the language and purpose of the statute:

> The credit provision must be read in the context of the statute as a whole, which is designed to protect workers from the twin evils of excessive work hours and substandard wages. *Barrentine [v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981)]; *Monahan v. County of Chesterfield, Virg.*, 95 F.3d 1263, 1267 (4th Cir. 1996). Toward that end, the statute requires the payment of time and a half for overtime work. Courts have long interpreted the FLSA as requiring that those payments be timely made. *Brooklyn Savs. Bank v. O'Neil*, 324 U.S. 697, 703-07 (1945); *Rogers v. City of Troy, N.Y.*, 148 F.3d 52,

55 (2d Cir. 1998); *Calderon v. Witvoet,* 999 F.2d 1101, 1107 (7th Cir. 1993). Thus, the statute is violated even if the employer eventually pays the overtime amount that was due. *See Rogers,* 148 F.3d at 55. In fact, that requirement may not be waived, and "even the workers' enthusiastic assent to deferred payment – a form of employer-held savings account – is ineffectual." *Calderon,* 999 F.2d at 1107. That principle is also found at 29 C.F.R. § 778.106, which provides in relevant part:

> The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of the overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the FLSA will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made.

Although that regulation is not entitled to deference, . . . it is nonetheless persuasive as it is consistent with the interpretation of the FLSA that the courts have reached. Therefore, under the statute, overtime generally must be calculated and paid on a pay period by pay period basis. The City, however, advocates a method of payment that would allow it to pay its overtime obligations at a time far removed from when that

> overtime amount was due. That is inconsistent with the statutory requirement that overtime payments must be timely made.

Howard, 274 F.3d at 1148.

In addition, the Ninth Circuit's opinion in *Biggs v. Wilson,* 1 F.3d 1537 (9th Cir. 1993) supports the Secretary's contention that its interpretation prevents possible abuses of the FLSA. In that case, the Ninth Circuit addressed the issue whether an employer's late payment of wages constituted a violation of the minimum wage requirement provision stated in 29 U.S.C. § 206(a). Similar to § 207(h)(2), there is no express language in § 206(a) specifying when § 206(a) is to apply. Analyzing the statutory scheme as a whole, the Ninth Circuit concluded that § 206(a) should be applied with the workweek standard as the reference point. In *Biggs,* the Ninth Circuit noted that "[t]he obligation [to pay the minimum wage] kicks in once an employee has done covered work in any workweek," and that "[i]f a payday has passed without payment, the employer cannot have met his obligation to 'pay'" *Id.* at 1539. As *Biggs* noted, "[u]nless there is a due date after which minimum wages become unpaid, imposing liability for both unpaid minimum wages and liquidated damages would be meaningless." *Id.* The same reasoning for using the workweek or work period standard also applies with respect to § 206(h) since it compels employers to make timely payments of overtime in conformity with the Act. *See* 29 C.F.R. 778.106 (requiring timely overtime payments); *see also Brooklyn Savs. Bank v. O'Neil,* 324 U.S. 697, 709 n.20 (1945) ("The necessity of prompt payment to workers of wages has long been recognized by Congress as well as by state legislatures.")

Further, as the Secretary points out, *Roland Electric Co. v. Black,* 163 F.2d 417 (4th Cir. 1947) supports the idea that the statutory provision in question should operate on a workweek or work period basis. In *Roland,* the Fourth Circuit, interpreting the version of the FLSA then in effect, held that an employer must pay overtime "promptly and when due" and is not allowed to compromise or settle sums due employees by "withholding wages beyond the time when they should be paid." 163 F.2d at 421. Specifically, *Roland* noted "that the Act takes as its standard a single workweek consisting of seven consecutive days." *Id.* Although *Roland* was decided before § 207(h) was enacted in 1949, and thus did not address the issue of crediting, it enunciated the broad principle that the workweek or work period is central to the understanding of the FLSA.

Contrary to FCA's argument, the Secretary's interpretation of § 207(h)(2) does not provide a "windfall" for its employees in this case. As the Secretary points out, FCA exceeded the requirements of FLSA, choosing to pay its workers certain premiums. Given that there is nothing in the FLSA generally or § 207(h)(2) in particular that required FCA to pay these premiums, any "windfall" arose as a result of FCA's own chosen pay practices. Accordingly, we agree with the Secretary that FCA's pay practices should not control the operation of the FLSA. Were that the case, then an employer who paid twice the minimum wage in one week would not owe anything the following week for the same number of hours worked. See *Barrentine v. Arkansas-Best Freight Sys. Inc.,* 450 U.S. 728, 739 (1981) (remarking that "[t]he Fair Labor Standards Act was not designed to codify or perpetuate [industry] customs and contracts").

Finally, we note that the Secretary's interpretation of § 207(h)(2) has been set forth in several Wage-Hour opinion letters issued by the Wage and Hour Division of the Department of Labor interpreting 29 U.S.C. § 207(h)(2) as applying a workweek or work period standard.[8] "When faced with a problem of statutory construction, federal courts should show 'great deference to the interpretation given the statute by the officers or agency charged with its enforcement.'" *Biggs*, 1 F.3d at 1543 (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). Specifically, in an opinion letter dated December 23, 1985, the Deputy Administrator stated:

> We wish to point out that surplus overtime premium payments, which may be credited against overtime pay pursuant to section 7(h) of [the] FLSA, may not be carried forward or applied retroactively to satisfy an employer's overtime pay obligation in future or past pay periods.

1985 WL 304329, at *3 (DOL Wage-Hour, December 23, 1985). The Secretary claims that this interpretation is consistent with previous Wage-Hour opinion letters, 66-69 CCH-WH ¶ 30,524 and ¶ 30,527, dated December 2 and December 20, 1966, expressing the view that the workweek or work period concept is the standard point of reference for interpreting the provisions of the FLSA.

We note the pertinent content of these opinion letters for illustrative purposes; we would hold as we do even in the absence of such opinion letters. The informative

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[8] The Wage and Hour Division of the Department of Labor was created to administer the Act. 29 U.S.C. § 204.

nature of these opinion letters which support the Secretary's interpretation of § 207(h) is not lessened by the fact that the opinion letters in question were directed to third parties, not FCA. *See United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (finding that Custom's classification ruling was entitled to "respect proportional to its 'power to persuade'" under the principles stated by Justice Jackson in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and that "[s]uch a ruling may surely claim the merit of its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight").

CONCLUSION

Thus, for the forgoing reasons, we **AFFIRM** the district court's order finding that FCA was liable for the aggregate amount of $545,262.21 for its overtime liabilities under the FLSA. However, we **REVERSE** the district court's order finding that FCA was entitled to an "extra compensation" credit of $113,313.63 pursuant to 29 U.S.C. § 207(h)(2) and **REMAND** the matter to the district court to determine the amount of compensation credit that FCA may claim on a pay period by pay period basis.

CONCURRENCE

WILLIAMS, Senior District Judge, concurring. I concur in the result set forth in Judge Clay's opinion. I write separately to say that I believe that this opinion correctly follows the rules of statutory interpretation. Also, I agree with the opinion of the Seventh Circuit in *Howard v. City of Springfield*, 274 F.3d 1141 (7th Cir. 2001). I am of

the opinion that the fourth, fifth and sixth paragraphs of the Substantive History section of this opinion have no application in this case and, at most, are dictum, in which I do not concur.

With regard to Judge Siler's dissenting opinion, his position has merit. However, if the law is to be corrected it should be done so by Congress or the administrative agency and not by the Court.

DISSENT

SILER, Circuit Judge, dissenting. I respectfully dissent, not because the majority opinion is illogical in its conclusion that the premium credits allowed by 29 U.S.C. § 207(h)(2) should be limited to the same work period in which the premiums were paid, but because the statute does not so provide. I would not penalize the employer who computes its premium credits as allowed in this case.

The majority opinion has analyzed the case law on this point. Thus, an employer in Illinois is restricted to premium credits within the same work period in which the premiums were paid. *See Howard v. City of Springfield,* 274 F.3d 1141, 1149 (7th Cir. 2001); *Nolan v. City of Chicago,* 125 F. Supp.2d 324, 331-33 (N.D. Ill. 2000). On the other hand, a federal employer, a Georgia employer, or, previously, a Michigan employer, could receive premium credits over a greater period of time than the same work period. *See Alexander v. United States,* 32 F.3d 1571, 1577 (Fed. Cir. 1994); *Kohlheim v. Glynn County,* 915 F.2d 1473, 1481 (11th Cir. 1990); *Abbey v. City of Jackson,* 883 F. Supp. 181, 186-87 (E.D. Mich. 1995). It is unfair for the

Secretary of Labor to force an employer to pay the additional amount of $113, 313.63 when the statute does not so provide, no regulation has ever been promulgated on the subject, and employers in other states are allowed these premium credits. As Judge Manion states in his dissent in *Howard,* 274 F.3d at 1149: "Neither the provisions of § 207(h)(2) of the FLSA, nor its accompanying regulations, require such a limitation."

Both parties agree that FCA would be entitled to a credit of any premium pay. The issue is whether the premium pay credit is limited to the same time period. The Department of Labor has for more than ten years known that there was a dispute about the limitations of the premium credits, but it has chosen not to attempt to promulgate regulations which would have been given some deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-844 (1984). I agree with the majority that no deference should be given to the opinion letters from the Secretary. If the Secretary wishes for deference, she has the authority to promulgate regulations which can be given deference under *Chevron.* Therefore, for the same reasons related by Judge Feikens in *Abbey,* I would affirm the decision of the district court here.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALEXIS M. HERMAN, Secretary of Labor, United States Department of Labor, Plaintiff, -vs- FABRI-CENTERS OF AMERICA, INC., Defendant.	JUDGE PAUL R. MATIA CASE NO. 5:98CV0970 MEMORANDUM OF OPINION AND ORDER RE: GRANTING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Filed Sep. 29, 2000)

The within matter is before the Court pursuant to plaintiff's and defendant's cross motions for summary judgment. The Court has considered the joint stipulation of facts (Doc. 13) and the memoranda submitted by the parties (Docs. 15-19). For the reasons that follow, the Court will *GRANT IN PART* plaintiff's motion and will *GRANT IN PART* defendant's motion.

I.

As required by the Court's Case Management Plan (Doc. 10), the parties stipulated the facts necessary to determine the cross motions for summary judgment (Doc. 13). A summary of those facts follow.

Defendant Fabri-Centers of America, Inc. ("FCA") owns and operates retail stores offering fabrics, notions,

and crafts to consumers in forty-eight states. FCA maintains a warehouse and distribution center for its products in Hudson, Ohio. At all times relevant to this dispute, the United Steelworkers of America, AFL-CIO-CLC (Upholstery and Allied Industries Division), Local Union No. 48U, represented FCA's production, maintenance and distribution employees at the Hudson facility. The collective bargaining agreement between the union and FCA provided the unique compensation formula at the root of this action.[1]

FCA utilized a multifaceted compensation system, combining various pay rates to determine employee wages. Payment consisted of two basic components: "regular pay" and "bonus pay." To calculate the former, FCA assigned each employee a home job code within the Hudson facility. For all work done within the home job code, the employees' "regular pay" was simply calculated by multiplying hours worked by their hourly base rate. When employees worked outside their home job code (at another location), their "regular pay" was calculated as the *greater* sum resulting from one of two formulas.

FCA based the first formula on what they called the "average rate." True to its name, the "average rate" took the average wage earned over a particular six month period. Specifically, FCA took the total wages earned by an employee in the six month period and divided that figure

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[1] FCA no longer utilizes this compensation formula. The collective bargaining agreement was amended on May 17, 1998, eliminating the policies the Department of Labor claims violated the FLSA. As such, the Court finds plaintiff's prayer for injunctive relief to be moot.

by the total hours the employee worked over the same time span.[2]

The second compensation formula used for work outside of the home job code was dubbed "bonus pay." FCA calculated "bonus pay" using either: [1] units of merchandise completed in a given "bonus tier" (above a minimum level) multiplied by a set "bonus rate" for each given bonus tier; or [2] special bonuses calculated by a job I.D. If the "average rate" for employees working outside of their home job code did not result in a higher figure, the wage equaled the product of hours worked multiplied by base rate plus any "bonus pay."[3]

FCA also paid its employees overtime wages. Overtime accrued when employees worked over eight hours per day after accumulating a forty hour workweek and/or when working Saturdays after accumulating forty hours. CFA [sic] calculated overtime pay by multiplying an employee's overtime hours by 1.5 times that employee's base rate. The base rate did not incorporate the "average" or "downtime" rates, nor did it incorporate "bonus pay" or various shift differentials. These differentials included

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[2] Employees who had worked less than thirty days were compensated based on the "down time" pay rate in the collective bargaining agreement.

[3] In mathematical terms: Compensation = (hours worked x base rate) + "bonus pay."

double time for working Sundays, "holiday" and "vacation" pay,[4] "down time" pay,[5] and "paid time off."[6]

The parties agree that FCA is an "[e]nterprise engaged in commerce or the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 203(s)(1) and an "employer" within the meaning of 29 U.S.C. § 203(d). As such, the parties concede that FCA is bound to the provisions of the FLSA.

The gravamen of this action is FCA's calculation of overtime. Prior to renegotiating the collective bargaining agreement, overtime pay for FCA employees was based solely on their base rate of pay. Notwithstanding the other rates of pay available at FCA, all overtime hours were compensated at the lowest rate possible. It is undisputed, however, that FCA's compensation plan allowed employees to earn premiums in excess of FLSA standards. These premiums accrued regardless of whether employees worked overtime. Thus, the question at the heart of this matter is whether the premiums paid under the plan offset any alleged shortcomings in calculating overtime pay.

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[4] FCA calculated "holiday" and "vacation" pay by multiplying the employees' average rate by their holiday or vacation hours. Only employees who worked for FCA for one (1) year or longer received vacation pay.

[5] FCA calculated "down time" pay by multiplying the employees' down time rate by their hourly down time hours.

[6] FCA calculated paid time off by multiplying the employees' "average rate" (or "downtime" rate if the employee had not yet earned an "average rate") by their hours of paid time off.

Plaintiff, Alexis M. Herman, Secretary of Labor, United States Department of Labor ("DOL"), contends that the FLSA dictates that FCA incorporate all employee pay rates into the base rate (or regular rate) for overtime purposes. The DOL further contends that premiums earned by employees may only offset overtime due within the same workweek. In rebuttal, FCA argues that the premiums can offset the total overtime due. After spot investigations at FCA, the DOL brought this action on behalf of FCA employees to recover overtime compensation that is allegedly owed under the former compensation plan.

At the Case Management Conference, the parties agreed that this matter was suitable for cross motions for summary judgment. After considering the memoranda submitted by the parties, the applicable provisions of the FLSA, and existing case law, the Court finds that both motions should be granted in part.

II.

Fed. R. Civ. P. 56(c) governs summary judgment motions and directs the Court to grant summary judgment

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.

A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether it is

"genuine" requires consideration of the applicable evidentiary standard. *Id.* at 252. The Court must decide whether reasonable jurors could find that the nonmoving party is entitled to a verdict. In reviewing the motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party when deciding whether a genuine issue of material fact exists. *Matsushita EEC. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Assn., Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990).

"To withstand a motion for summary judgment the opposing party 'may not rest upon the mere allegations or denials' in its pleadings, but must respond 'by affidavits or as otherwise provided . . . [setting] forth specific facts showing that there is a genuine issue for trial.' Fed. R. Civ. P. 56(e). [M]ere conclusory allegations are insufficient to withstand a motion for summary judgment." *Cincinnati Bell Telephone Co. v. Allnet Communications Services, Inc.*, 17 F.3d 921, 923 (6th Cir. 1994) (*quoting McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir. 1990)).

III.

A. FCA's Calculation Of Overtime Payments

The threshold issue in this matter is whether defendant violated the FLSA by calculating overtime payments using only the employees' base rate. Because FCA's overtime calculations never included the "average rate" or

"bonus pay," the DOL alleges violations of the FLSA.[7] 29 U.S.C. § 207(a) of the FLSA provides, in part, that:

> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the *regular rate* at which he is employed. (Emphasis added.)

The statute defines "regular rate" as "all remuneration for employment paid to, or on behalf of, the employee." 29 U.S.C. § 207(e).

The Court finds that the "bonus pay," "average pay," and shift differentials all fall into the category of "regular pay" for overtime purposes. First, it is well established that nondiscretionary bonuses should be included in the calculation of "regular pay." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 89 L. Ed. 1705, 65 S. Ct. 1242 (1945) (holding that performance bonus must be included in "regular rate" calculation); *Featsent v. City of Youngstown*, 70 F.3d 900, 904-05 (6th Cir. 1995) (education bonuses must be included in "regular rate"); and 29 U.S.C. § 207(e)(3) (only excluding bonuses within the *sole*

[7] FCA failed to address the propriety of its overtime calculations in its briefs. Instead, FCA focused solely on whether or not it could credit the premiums paid to employees against the overtime owed.

discretion of employers from the "regular rate"). As the Court in *Walling* explained:

> The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary "regular rate" in the wage contracts.

325 U.S. at 425. Therefore, agreed bonuses not excluded by § 207(e), must be included in employees' "regular rate."

FCA's failure to include "bonus pay" in its employees' overtime compensation clearly violated the FLSA. As stipulated, FCA awarded "bonus pay" for [1] units of merchandise completed in a given "bonus tier" (above a minimum level) or for [2] special bonuses calculated by a job I.D. Clearly neither category of bonus pay is within the discretion of the FCA. Therefore, these nondiscretionary bonuses must be included in the "regular rate", and FCA's failure to do so constitutes a FLSA violation under 29 U.S.C. § 215(a)(2).[8]

The Court also finds that the "average rate" and other shift differentials must be included in FCA's calculation of

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[8] 29 U.S.C. § 215(a)(2) provides that "it shall be unlawful for any person . . . to violate any of the provisions of . . . section 207 of this title. . . ."

"regular rate." In *Featsent*, the Sixth Circuit held that § 207(e)(2) does not exclude shift differentials from the regular rate and required that the differentials be included in overtime compensation. *Featsent*, 70 F.3d at 904-05 (citing *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 92 L. Ed. 1502, 68 S. Ct. 1186 (1948)). The Supreme Court defined shift differentials as situations "[w]here an employee receives a higher wage or rate because of undesirable hours or disagreeable work." *Bay Ridge*, 334 U.S. at 469. The Court concludes "average pay" is analogous to a shift differential because it pays employees a premium for working at locations outside of their home job code (i.e., outside of the Hudson facility). *Cf. Reich v. Interstate Brands Corp.*, 57 F.3d 574, 578-79 (7th Cir. 1995) (analogizing work credits to premium rates and including the credits as part of the "regular rate"). Therefore FCA further violated the FLSA by not including the "average rate" and other shift differentials as part of the "regular rate."

Lastly, FCA failed to follow the guidelines in 29 C.F.R. § 778.318(b) regarding "down time" compensation. Under § 778.318(b), "[t]he parties may agree to compensate nonproductive hours worked at a rate (at least the minimum) which is lower than the rate applicable to productive work." Employers, however, must incorporate that "down time" rate into the calculation of "regular rate" when determining overtime. *Id.* FCA, by simply using the base rate as the "regular rate," failed to comply. Accordingly, the DOL is entitled to judgment as a matter of law on this claim that FCA violated the FLSA in calculating the "regular rate" for overtime purpose.

B. Crediting FCA's Premium Payments

In the face of these overtime miscalculations, FCA argues that it be allowed to offset the overtime charges with premiums it paid in excess of FLSA requirements. The DOL counters that 29 U.S.C. § 207(h) only allows FCA to "credit workweeks wherein FLSA excess 'premium' compensation was remitted to the employee against other workweeks where [the DOL] alleges that overtime earnings are in fact owed to that same employee." (Joint Stipulation of Facts (Doc. 13) ¶ 12.) Put another way, FCA is claiming that all premiums are creditable *regardless of the workweek* they were paid, while the DOL contends that premiums can only be offset *within the same workweek* as the missed overtime. Based upon the plain language of Section 207(h), existing case law, and the legislative history of § 207, the Court agrees with FCA. All premium payments can be credited toward the total overtime owed.

The plain language of 29 U.S.C. § 207(h) allows employers to offset unpaid overtime with premiums paid to employees. Section 207(h) reads: "Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section *shall be creditable* toward overtime compensation payable pursuant to this section"[9] (emphasis

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[9] Those subsections provide that:

* * *

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(Continued on following page)

added). The Court fails to find any qualifying language in the statute limiting credits on a workweek basis.

Nonetheless, the DOL asks the Court to read a qualifier into the clear statutory language – namely, that the intent behind the statute was to allow employers to credit premiums only within specific workweeks. In support of its theory, the DOL points to the fact that § 207 is couched in terms of a workweek. The DOL also cites its own regulation that states "[t]he Act takes a single workweek as its standard and does not permit averaging of hours over 2 or more weeks." 29 C.F.R. §778.104. The sentences following this provision, however, put that statement in its proper context.[10] While the Court readily understands that

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(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays or regular days of rest . . . where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek . . . where such premium rate is not less than one and one-half times the rate established in good faith by the . . . agreement for like work performed during such workday or workweek.

[10] Section 778.104 states:

The Act takes a single workweek as its standard and does not permit averaging of hours over 2 or more weeks. Thus, if an employee works 30 hours one week and 50 hours the next, he must receive overtime compensation for the overtime hours worked beyond the applicable maximum in the second week, even though the average number of hours

(Continued on following page)

employers are bound to pay overtime on a per workweek basis, the regulation cited by the DOL in no way touches upon credits for premium compensation.

More important, recent case law within this circuit flatly rejects the theory the DOL is espousing. In *Abbey v. City of Jackson*, the Court held that a municipality, as employer, was entitled to credit all premium payments regardless of the workweek in which they occurred. 883 F. Supp. 181 (E.D. Mich. 1995). Like the instant case, the plaintiff in *Abbey* argued that premiums only offset overtime within the same earnings period.[11] Notably, Judge Feikens's opinion in *Abbey* emphasized the dearth of precedent, legislative history, and statutory language supporting the workweek theory. The Court finds the same shortcomings in the instant case. The DOL fails to produce any authority indicating that the Court should read workweek limitations into § 207(h). Certainly, Congress could have specified a per workweek limitation in

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worked in the 2 weeks is 40. This is true regardless of whether the employee works on a standard or swing-shift schedule and regardless of whether he is paid on a daily, weekly, biweekly, monthly or other basis. The rule is also applicable to pieceworkers and employees paid on a commission basis. It is therefore necessary to determine the hours worked and the compensation earned by pieceworkers and commission employees on a weekly basis.

[11] Because municipal employees were the focus in *Abbey*, the pay period in that case was 212 hours rather than a forty-hour workweek. *See* 29 U.S.C. § 553. The DOL makes much of this difference. In particular, the DOL maintains that *Abbey* is limited to the public employee setting and does not apply to private employees with a forty-hour workweek. The Court is unpersuaded by this argument. The reasoning in *Abbey* is based squarely on the language and precedent surrounding 29 U.S.C. § 207(h), not any public/private distinction.

§ 207(h) if it saw fit. As it stands, that language, and therefore that limitation, does not exist in § 207(h), and the Court refuses to supply that limitation. FCA is entitled to a judgment as a matter of law to the extent it can credit past premiums toward the overtime it owes.

IV.

Based on the record, the Court concludes that plaintiff's motion for summary judgment is *GRANTED IN PART*, and defendant's motion for summary judgment is *GRANTED IN PART*. The parties hare hereby ordered to confer and contact the Court with a mutually agreeable date to conduct a Scheduling Conference. At that Conference, the Court expects that the parties will present a summary of the overtime payments owed, including an accounting for the offset premiums, and a suitable schedule for payment.

IT IS SO ORDERED.

/s/ Paul R. Matia
JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES
DISTRICT JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing Order has been sent this *29th day of September, 2000*, by regular U.S. Mail to Sandra B. Kramer, Esq., Department Of Labor, 881 Anthony J. Celebreeze Federal Bldg., 1240 East Ninth Street, Cleveland, OH 44199; Harley M. Kastner, Esq., and Keith L. Pryatel, Esq., Kastner, Westman & Wilkins, 3480 West Market Street, Ste. 300, Akron, OH 44333.

/s/ Paul R. Matia
JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALEXIS M. HERMAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,	**CASE NO. 98-CV-00970**
Plaintiff,	**JUDGE PAUL MATIA, JR.**
v.	**(MAGISTRATE JUDGE VECCHIARELLI)**
FABRI-CENTERS OF AMERICA, INC.,	**JOINT STIPULATION**
Defendant.	(Filed Nov. 7, 2000)

Plaintiff, **ALEXIS M. HERMAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR**, and Defendant, **FABRI-CENTERS OF AMERICA, INC.**, hereby jointly stipulate to the following: (1) the aggregate amount of FLSA overtime liability attributable to Defendant pursuant to the Court's September 29, 2000 Memorandum Opinion and Order is Five Hundred Forty Five Thousand, Two Hundred Sixty-Two and 21/100 Dollars ($545,262.21); (2) Defendant is, pursuant to the Court's September 29, 2000 Memorandum Opinion and Order, entitled to an "extra compensation" credit of One Hundred Thirteen Thousand, Three Hundred Thirteen and 63/100 Dollars ($113,313.63); and (3) the net amount due and owing by Defendant by way of judgment of the Court pursuant to its September 29, 2000 Memorandum

Opinion and Order is Four Hundred Thirty One Thousand, Nine Hundred Forty-Eight and 58/100 Dollars ($431,948.58).

It is ordered that the Plaintiff recover from the Defendant the sum of $431,948.58, for which execution may issue, for distribution by the Plaintiff to the employees listed on the attached Exhibit A, in the amounts set forth following each employee's name. The Defendant shall make payment to the Plaintiff for disbursement by her as prescribed by law, provided that any money not so distributed by the Plaintiff within a reasonable time because of such person's refusal to accept such money or because of failure to locate the proper person, shall be covered into the Treasury of the United States as miscellaneous receipts.

This Joint Stipulation is entered for the sole purpose of converting the Court's September 29, 2000 Memorandum Opinion and Order into final judgment pursuant to Fed. R. Civ. P. 54(b), and shall not foreclose or serve to limit either Plaintiff or Defendant from appealing the Court's September 29, 2000 ruling. The time for any such appeal under F.R.A.P. 4 shall be deemed to commence running when the Court enters an order finally disposing of this case.

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APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALEXIS M. HERMAN, Secretary of Labor, United States Department of Labor, Plaintiff, -vs- FABRI-CENTERS OF AMERICA, INC., Defendant.	JUDGE PAUL R. MATIA CASE NO. 5:98CV0970 JUDGMENT ENTRY (Filed Nov. 21, 2000)

The within matter is before the Court on the parties' joint stipulation (Doc. 22). Accordingly, the Court enters judgment, pursuant to Fed. R. Civ. P. 58, in favor of plaintiff. Defendant is ordered to pay damages in the amount and manner described in the joint stipulation.

IT IS SO ORDERED.

/s/ Paul R. Matia
JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

CERTIFICATE OF SERVICE

A copy of the foregoing Order has been sent this *21st day of November, 2000*, by regular U.S. Mail to Sandra B. Kramer, Esq., Department Of Labor, 881 Anthony J. Celebreeze Federal Bldg., 1240 East Ninth Street, Cleveland, OH 44199; Harley M. Kastner, Esq., and Keith L.

Pryatel, Esq., Kastner, Westman & Wilkins, 3480 West Market Street, Ste. 300, Akron, OH 44333.

/s/ Paul R. Matia
JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

FILED
FEB 3 2003
OFFICE OF THE CLERK

No. 02-798

In the Supreme Court of the United States

FABRI-CENTERS OF AMERICA, INC., PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Fair Labor Standards Act (FLSA), certain "extra compensation" is excluded from an employee's regular rate of pay for purposes of calculating overtime compensation. 29 U.S.C. 207(e)(5), (6), and (7). The question presented is:

Whether an employer who makes extra compensation payments qualifying under 29 U.S.C. 207(e)(5) and (6) may, under the crediting provision of 29 U.S.C. 207(h)(2), credit that extra compensation against FLSA overtime liabilities only for the same workweek or work period for which the extra compensation was paid.

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In the Supreme Court of the United States

No. 02-798

FABRI-CENTERS OF AMERICA, INC., PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 308 F.3d 580. The decision and order of the district court (Pet. App. 28a-40a; 45a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 2002. The petition for a writ of certiorari was filed on November 20, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Sections 7 and 15(a)(2) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 207, 215(a), require employers to pay covered employees who work more than

40 hours in any workweek overtime pay for those extra hours. Under the FLSA, the overtime rate must be not less than one-and-one-half times the employee's regular rate of pay. 29 U.S.C. 207. In general, FLSA overtime payments must be made promptly, such that "overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends." 29 C.F.R. 778.106. Section 15(a)(2) of the FLSA, 29 U.S.C. 215(a)(2), makes it unlawful for any person "to violate * * * section 207 of this title."

When calculating the employee's "regular" rate of pay for purposes of computing FLSA overtime, employers must include certain types of "bonus" pay and "shift differentials." The FLSA, however, also provides that some types of "[e]xtra compensation" paid by employers "as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section." 29 U.S.C. 207(h)(2). In other words, where employers provide certain types of extra or premium compensation, that compensation may be used to offset the overtime pay that the FLSA would otherwise require. This case concerns whether such credits should be calculated on a work-period basis, or instead under an aggregate methodology. Under the work-period method, an employer may credit premiums paid during one work period only against the FLSA overtime for that same work period. Under the aggregate method, an employer may carry premiums forward or backward, whenever paid, against any FLSA overtime that is otherwise owed.

To illustrate the difference between the work-period method (the Secretary's view) and the aggregate method (petitioner's view), assume that, pursuant to a collective bargaining agreement, an employee is paid a

regular rate of $10 per hour, plus double time for work performed on Sunday. The employee ordinarily works 40 hours per week and receives $400. If, in a given workweek, the employee works 40 hours from Monday through Friday, and then 8 hours on Sunday, the employee is entitled to $560—regular weekly pay of $400 plus $160 for Sunday (8 hours x $20/hour) under the collective bargaining agreement. The FLSA mandates that the 8 hours worked in excess of the 40-hour workweek be compensated at not less than 1-1/2 times the regular rate or $120 (8 hours x $15/hour). The $160 paid under the bargaining agreement for Sunday work is a premium payment qualifying under Section 207(e)(6). Thus, while it is excluded by that provision from the calculation of the regular rate of pay (which remains $10 per hour), it may be credited under Section 207(h) against the FLSA overtime otherwise owing. In this hypothetical, the contractual premium payment ($160) is larger than the FLSA overtime owing ($120); it thus completely extinguishes the FLSA liability, and the employee is paid under the collective bargaining agreement.

Assume, however, that in a later workweek, the employee works 50 hours and none of those hours are on Sunday. Under the collective bargaining agreement, the employee would be entitled to $500—regular weekly pay of $400 + $100 (10 hours x $10/hour). The FLSA, however, mandates $150 for the 10 overtime hours—10 hours x $15/hour. Because the employer has made no premium payment in that later workweek, under the Secretary's work-period construction, the employer receives no credit against the FLSA overtime otherwise owing. The employer must pay the full FLSA overtime for the later workweek, and the $40 premium the employer paid in week one in excess of

what the FLSA mandated—$160 minus $120—cannot be carried forward to extinguish that later liability. In contrast, under petitioner's (aggregate) method, the employer would apply the $40 credit in the later workweek (even if that workweek occurred years later). The result would be that, in the later workweek, the 10 hours of overtime work would yield only an extra $110 in compensation—$150 minus $40—not the $150 otherwise mandated by the FLSA.

2. Petitioner Fabri-Centers of America, Inc. owns and operates retail stores that sell fabrics, notions, and crafts. Pet. App. 4a, 28a-29a. It also maintains a warehouse and distribution center. *Ibid.* Pursuant to a collective bargaining agreement in effect between April 1, 1996, and May 17, 1998, petitioner paid its employees a base rate for work performed at their primary work location in the Hudson, Ohio, warehouse. *Id.* at 6a, 29a & n.1. Those employees' "regular pay" consisted of the hourly base rate multiplied by the number of hours worked. *Id.* at 6a, 29a. For work performed at any other location, however, "regular pay" was determined by the higher of two formulas. The first formula consisted of calculating the "average rate," under which petitioner took the total wages the employee earned over a six-month period (including overtime pay) and divided it by the total hours worked in that period (including overtime hours). *Id.* at 6a-7a, 29a-30a. The second formula consisted of calculating "bonus pay," which was based on the extent to which the employee met or exceeded certain production goals. Under the "bonus pay" formula, the employee was paid "the product of hours worked multiplied by base rate plus any 'bonus pay.'" *Id.* at 30a. Petitioner also paid daily contractual overtime (of one-and-one-half times the "base rate") for work performed in excess of eight hours in a

day, and for Saturday work after a 40-hour workweek. *Id.* at 30a. Petitioner paid double time for work performed on Sundays. *Id.* at 30a-31a. It is not disputed that petitioner's methodology violated the FLSA, because the hourly base rate for calculating overtime compensation did not include the average rate, bonus pay, or other shift differentials. *Id.* at 7a-8a, 30a-31a.

The Secretary of Labor brought this enforcement action under 29 U.S.C. 217 in the United States District Court for the Northern District of Ohio, to enjoin petitioner from violating Sections 7 and 15(a)(2) of the FLSA, 29 U.S.C. 207, 215(a)(2). Pet. App. 3a.[1] Petitioner did not contest that it violated the FLSA when it failed to include the average rate, bonus pay, and other shift differentials in the employees' regular rate of pay for purposes of computing FLSA overtime pay. Pet. App. 8a, 34a n.7. Petitioner, however, sought a credit under 29 U.S.C. 207(h) for the contractual premiums it paid in excess of FLSA requirements during the two years in question. Pet. App. 8a, 37a. There was no dispute that some credit was appropriate; the only dispute concerned how that credit should be calculated.

The Secretary contended that qualifying premiums paid by petitioner could be credited against FLSA overtime only for the workweek for which the premiums were paid. Petitioner, in contrast, proposed crediting the total premiums, regardless of when earned, against the total FLSA overtime owed for the entire two-year period. Pet. App. 8a, 37a. The parties stipulated that, under the Secretary's interpretation, the overtime owing was $545,262.21, and that, under peti-

[1] The Secretary also alleged violations of the FLSA's record-keeping requirements, 29 U.S.C. 211(c), 215(a)(5). Pet. App. 3a. Neither court addressed those allegations.

tioner's interpretation, the overtime owing was $431,948.58. *Id.* at 42a-43a.

The district court granted the Secretary partial summary judgment on the issue of liability, holding that petitioner violated FLSA overtime requirements. Pet. App. 33a-36a. However, the court also granted partial summary judgment to petitioner on the premium-crediting issue. Agreeing with petitioner's interpretation of Section 207(h), the court held that petitioner could credit all past premium payments for the entire two-year period against all FLSA overtime owed. It ordered petitioner to pay the amount ($431,948.58) specified in the joint stipulation consistent with its interpretation. *Id.* at 45a.

3. The court of appeals affirmed on liability, but reversed and remanded on the method of crediting premium payments. Pet. App. 25a. The court first determined that the text of the FLSA is silent or ambiguous "as to when 'extra compensation' credit may be used." *Id.* at 11a-12a. Because the statute's text did not answer the precise question before it, the court also reviewed the legislative history of the relevant provision. That legislative history, the court noted, provided evidence that Congress, when it enacted the crediting provision in 1949, was aware of the Secretary's methodology, under which credits for "contractual premiums against statutory overtime owed to employees" would be calculated "using the seven-day workweek as the standard reference point." *Id.* at 14a. The court also noted that Congress had amended the statute twice in response to a 1948 decision of this Court that had required the payment of "overtime on overtime." *Id.* at 12a-13a. The first amendment allowed an employer to apply extra compensation paid pursuant to a contract "toward *any* premium compensation due [under the

FLSA]." *Id.* at 13a. That language was "short-lived," however, as Congress more extensively revised the FLSA later in 1949. *Ibid.* The later revisions included the current language of 29 U.S.C. 207(e)(5), (6), and (7), which exclude certain premium payments from the calculation of overtime, and the current crediting language of Section 207(h)(2), which provides that employer premiums may be applied "toward overtime compensation payable pursuant to this section." Pet. App. 13a. The court of appeals was persuaded that, whatever the precise meaning of the original "toward *any* premium" language, Congress intended to change and limit that provision's meaning when it deleted the word "any" in the later amendments. *Id.* at 16a-17a. The court of appeals also rejected petitioner's argument that the juxtaposition of "extra compensation *paid*" with "overtime compensation *payable*" in 29 U.S.C. 207(h)(2) (emphases added) indicated a clear intent that all past extra compensation be creditable against all future FLSA overtime compensation. Pet. App. 15a-16a. The court concluded that "the relevant legislative history tends to favor the Secretary's position that the statute should be interpreted to include a workweek or work period restriction." *Id.* at 12a.

The court also agreed with the Secretary that "the FLSA as a whole and the [Department of Labor's] implementing regulations of the Act highlight the primacy of the workweek concept." Pet. App. 17a. The provisions of the Act establish the workweek as the benchmark for calculating overtime, and the "regulations implementing the Act support prompt payment of overtime." *Id.* at 18a. The court was persuaded that the prompt-payment regulation, 29 C.F.R. 778.106, "suggest[s] that the premiums should be credited within the same workweek in which they were paid."

Pet. App. 18a. Thus, while the court of appeals perceived "divergent case law" on the issue, *id.* at 19a, it concluded that "the case law supporting the Secretary's interpretation appears to be more persuasive." *Id.* at 20a.

Finally, the court of appeals noted that, for decades, the Department of Labor had issued Wage-Hour Opinion letters "applying a workweek or work period standard." Pet. App. 24a. Although the court indicated that it "would hold" as it had "even in the absence of such opinion letters," the court nonetheless found the expert opinions expressed in those letters "informative." *Id.* at 24a-25a.

Judge Siler dissented. Pet. App. 26a-27a. In his view, it was "unfair for the Secretary of Labor to force an employer to [credit on a workweek basis] when the statute does not so provide, no regulation has ever been promulgated on the subject, and employers in other states are allowed these premium credits" because of allegedly divergent case law. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review thus is unwarranted.

1. Petitioner contends the Sixth Circuit's decision, while in accord with a decision of the Seventh Circuit, *Howard* v. *City of Springfield*, 274 F.3d 1141 (2001), creates a conflict with decisions from the Eleventh Circuit and the Federal Circuit. Pet. 3-4, 12-16. Notwithstanding the Sixth Circuit's perception of "divergent case law," Pet. App. 19a, there is no circuit conflict on the proper method of crediting contractual premium payments. Neither court of appeals decision cited by

the Sixth Circuit or petitioner as contrary authority, *Kohlheim* v. *Glynn County*, 915 F.2d 1473 (11th Cir. 1990), and *Alexander* v. *United States*, 32 F.3d 1571, 1577 (Fed. Cir. 1994), resolves that issue. To the contrary, the only court of appeals decisions that have squarely addressed the issue are the decision below and the Seventh Circuit's decision in *Howard*, *supra*, and both reached the same conclusion—that premium crediting pursuant to Section 207(h) of the FLSA "include[s] a workweek or work period restriction." Pet. App. 17a; see *Howard*, 274 F.3d at 1148-1149.[2] The premium crediting issue presented here thus has not arisen very often, but to the extent it has arisen, circuit law is uniform.

a. Petitioner cites the Eleventh Circuit's decision in *Kohlheim* for the proposition that Section 207(h) permits employers to credit premium payments for one workweek against FLSA overtime for another. See Pet. 13-14. *Kohlheim*, however, did not involve that issue. In that case, firefighters and emergency medical technicians brought suit against their county employer for FLSA overtime pay. 915 F.2d at 1473.[3] The *Kohlheim* court first decided that, under the statute and pertinent regulations, mealtimes should have been

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[2] Petitioner also cites *Abbey* v. *City of Jackson*, 883 F. Supp. 181 (E.D. Mich. 1995), as representing a contrary line of authority. Pet. 13-14. That Michigan District Court decision, however, does not survive the Sixth Circuit's decision in this case. See Pet. App. 20a. *Abbey* thus is no longer good law within the Sixth Circuit, and is without precedential effect elsewhere.

[3] Ordinarily, the FLSA takes the seven-day workweek as the basis for calculating FLSA overtime. However, firefighters are covered by 29 U.S.C. 207(k), which allows for a longer FLSA work period for public agencies engaged in fire-protection and law-enforcement duties. See 29 C.F.R. 553.224(a).

included as hours worked for overtime purposes. *Id.* at 1476-1477. Second, the court explained the proper method for calculating the "regular rate" of compensation for FLSA overtime purposes, contrasting it with the rate the county had been using. *Id.* at 1480. Finally, the court of appeals addressed whether the district court's order had precluded proper crediting of premium pay against the county's FLSA liability. *Id.* at 1481.

The issue petitioner raises here—whether the credits were limited to the workweek for which the premium payments were made—never arose. To the contrary, because the issues were certified for interlocutory appeal, 915 F.2d at 1476, damages had not yet been calculated. See *id.* at 1481 (recognizing need for separate "damages phase"). The sole question on crediting was whether the district court's order somehow improperly limited the premium pay that could be used as a credit. Throughout the time period in question, the county had paid overtime compensation at one-and-one-half times an "artificial hourly rate" known as the "2928 rate." *Id.* at 1481 & n.39. For some two-week periods, the 2928 rate was larger than the new "regular rate" calculated by the court, and, for other periods, it was smaller than the "regular rate." *Id.* at 1481. "The county admit[ted] liability for the compensation shortfalls during the[] periods" when "the '2928 rate' was smaller than the * * * 'regular rate.'" *Ibid.* However, the county read the district court's decision as "den[ying the county] credit for overtime premiums paid during" those "work periods when the '2928 rate' fell *below* the regular rate." *Ibid.* (emphasis added). On that issue, the court agreed "that the county should be allowed to set-off *all* previously paid overtime premiums, *not just those equal to or greater than 1 1/2 times the regular rate.*" *Ibid.*

(emphasis added); see *ibid.* ("the county is entitled to set off all previously paid overtime premiums, not just those of at least 1 1/2 times the regular rate, against any overtime compensation found to be due and owing during the damages phase of the trial."). The court did not purport to resolve whether premiums should be credited on a work-period or aggregate basis. Nor did the court analyze the statute's text, structure, history, or underlying policies to resolve that issue. *Kohlheim* thus cannot be taken as resolving the matter, and there is no reason to think the Eleventh Circuit would read *Kohlheim* as binding it to any particular result on the question should the issue arise in that circuit in some future case. Cf. *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993) (court is "free to address the merits" where it has "never squarely addressed the issue" or has "at most assumed" an answer).

b. To the extent petitioner also claims that *Alexander* v. *United States*, 32 F.3d 1571 (Fed. Cir. 1994), conflicts with the decision below, that claim too is incorrect.[4] In *Alexander*, the Federal Circuit considered whether premium payments made by the Immigration and Naturalization Service (INS) pursuant to another federal statute apart from the FLSA—the "1931 Act"—"constitute[] 'extra compensation provided by a premium rate' under the FLSA." *Id.* at 1577. Concluding that 1931 Act pay does constitute such "extra compensation provided by a premium rate," the court held that 1931 Act premium payments could be

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[4] Petitioner does not address *Alexander* directly. Instead, petitioner quotes the portion of the majority and dissenting opinions below suggesting that *Alexander* supports petitioner's position. See, *e.g.*, Pet. 4 n.2, 13.

credited toward overtime payments under Section 207(h). *Alexander*, 32 F.3d at 1577.

Alexander, however, nowhere holds that 1931 Act pay for one work period may be credited against FLSA overtime pay for another. As the decision below acknowledged, the court merely stated in passing that "1931 Act pay is creditable toward any overtime compensation due under the FLSA." 32 F.3d at 1577. It is highly doubtful that, by using the phrase "toward any overtime compensation due," the court of appeals meant to rule that premium pay can be credited under an aggregate as opposed to work-period method. To the contrary, the issue was not before the court, since the INS was crediting its 1931 Act premiums against FLSA overtime on a work-period basis. *Alexander* v. *United States*, 28 Fed. Cl. 475, 484 (1993) (explaining how INS calculates overtime on a "per pay period" basis); see 32 F.3d at 1572-1573 (INS "computed their overtime pay under FLSA * * * for all hours worked * * * in excess of 85.5 *per pay period*") (emphasis added);[5] see also pp. 13-14, *infra* (OPM regulations). To the extent the Federal Circuit's decision can be read as passing on the proper methodology, the court approved of the INS's work-period method, holding that the "INS' method of computing overtime pay for inspection work and border patrol duties is proper." 32 F.3d at 1577. Indeed, the Federal Circuit analyzed extra-compensation credits on a work-period basis: "The agency's approach is best understood through an example. Assume that, during a given pay period, an employee

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[5] Since the employees worked in law enforcement, 29 U.S.C. 207(k) provided a relevant work period of 85.5 hours over two weeks, see *Alexander*, 32 F.3d at 1576 n.5, rather than the normal 40-hour workweek. See also note 3, *supra*.

works 80 hours at a basic rate of $12.58 performing border patrol duties." 32 F.3d at 1575.

Against that background, there is no basis for concluding that the isolated phrase "toward any overtime" in the Federal Circuit's *Alexander* opinion must necessarily be read as a *sua sponte* ruling that the FLSA provides for aggregate (rather than work-period) crediting. In any event, even if the phrase could be so construed, any such pronouncement would be dictum that does not bind future panels.[6]

For that reason, petitioner errs in asserting that, "as the law is presently constituted, the Secretary can take advantage of the very [aggregate] credits that she seeks to deny to Fabri-Centers. *See, Alexander* v. *United States*, 32 F.3d 1571, 1577 (Fed. Cir. 1994)." Pet. 21. *Alexander* simply does not authorize (much less compel) the aggregate-crediting methodology that petitioner proposes. Furthermore, Office of Personnel Management (OPM) regulations bar the Secretary (and any other covered federal agency) from crediting premiums from one work period against FLSA overtime for another work period. The applicable regulation states: "An employee entitled to overtime pay under this subpart and [premium] overtime pay under any authority outside of title 5, United States Code, shall be

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[6] The issue before the *Alexander* court, after all, was whether to include 1931 Act pay as premium compensation that could be claimed as a credit under Section 207(h). On that issue, the court sided with the INS, holding that such payments properly fall under Section 207(h): "1931 Act pay constitutes 'extra compensation' * * * and [a]s a result, 1931 Act pay is creditable toward any overtime compensation due under the FLSA." 32 F.3d at 1577. The issue of precisely how the premiums would be applied against FLSA overtime liability was not at issue, much less considered and decided.

paid under whichever authority provides the greater overtime pay entitlement *in the workweek*." 5 C.F.R. 551.513 (emphasis added).[7] Thus, far from a "chaotic situation" (Pet. 21), Section 207(h) is applied uniformly to private and public employers alike.

2. The court of appeals' decision, moreover, is correct. Properly construed, Section 207(h)(2) permits an employer to credit contractual premium compensation against FLSA overtime otherwise due only on a work-period basis—a conclusion amply supported by the Act's text, its history, Department of Labor imple-

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[7] In administering the quoted regulation, covered executive agencies determine the statutory or contractual premium due in a given workweek and then compare that amount to the FLSA overtime payable over that same workweek. If the statutory premium in one week exceeds the FLSA amount payable, the employee receives the higher statutory premium. If the FLSA amount payable exceeds the statutory premium in the next week, the employee must "be paid under [the] authority [that] provides greater overtime pay entitlement in the workweek," *i.e.*, the FLSA amount. 5 C.F.R. 551.513. Thus, like the work-period approach adopted by the court of appeals, OPM regulations do not permit higher statutory premiums paid in one week to be credited against FLSA overtime for later (or earlier) periods. Besides, if there were ambiguity to OPM's regulation, the Department of Labor has clearly expressed its view that "surplus overtime premium payments * * * may not be carried forward or applied retroactively to satisfy an employer's overtime obligation in future or past pay periods." Department of Labor, *Wage-Hour Op. Letter No. 526*, 1985 WL 304329, at *8 (Dec. 23, 1985). In the event of a conflict between OPM and the Secretary of Labor in this area, "OPM is * * * obliged to exercise its administrative authority in a manner consistent with the Secretary of Labor's implementation of the FLSA. * * * When the civil service and FLSA systems conflict, OPM must defer to the FLSA so that any employee entitled to overtime compensation under FLSA receives it under the civil service rules." *AFGE* v. *OPM*, 821 F.2d 761, 770 (D.C. Cir. 1987).

menting regulations and opinion letters, and pertinent case law. Pet. App. 10a-26a.

a. First, the court of appeals' and Secretary's construction is strongly supported by the text and structure of the Act. By its terms, Section 207(h)(2) provides: "Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section." 29 U.S.C. 207(h)(2). While Section 207 does not itself specify the time period for calculating overtime and credits, the remaining provisions of the FLSA make clear that the workweek or work period is the applicable period. The substantive requirement of overtime is so framed: "No employer shall employ any of his employees who *in any workweek* is engaged in commerce * * * *for a workweek* longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. 207(a)(2)(C) (emphases added). Section 207(e)(5)-(7) contemplates that contractual premiums will be paid on a workweek basis: "extra compensation provided by a premium rate *paid for certain hours* * * * *in any* * * * *workweek*." 29 U.S.C. 207(e)(5) (emphasis added). See 29 U.S.C. 207(*l*) ("No employer shall employ any employee in domestic service * * * for a *workweek* longer than forty hours.") (emphasis added); *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 579 (1942) ("It is likewise abundantly clear from the words of § 7 that the unit of time under that section within which to distinguish regular

from overtime is the week.").[8] And Department of Labor regulations likewise highlight the primacy of the workweek or work period under the FLSA: "The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends." 29 C.F.R. 778.106; see 29 C.F.R. 778.103-778.105 ("The workweek as the basis for applying section 7(a)"; "Each workweek stands alone"; and "Determining the work-week").

The premium-payment credit provision at issue here, Section 207(h)(2), is most logically read in conjunction with those substantive overtime provisions. Under the statute, contractual premiums may be credited only "toward overtime compensation payable *pursuant to this section.*" 29 U.S.C. 207(h)(2) (emphasis added). Because FLSA overtime is "payable pursuant to" the FLSA on a work-period basis, credits against that overtime are likewise claimable on a work-period basis. In any event, as the court of appeals explained, these interrelated provisions of the FLSA "lend support to the Secretary's position that premium credits allowed by § 207(h)(2) should be limited to the same workweek or work period in which these premiums were paid." Pet. App. 19a.

Second, as the court below noted, the Administrator of the Wage and Hour Division, who enforces the FLSA

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[8] There are notable statutory exceptions to the use of the work-week standard under the FLSA, 29 U.S.C. 207(j)-(k), see notes 3-4, *supra*; note 9, *infra*, but those exceptions similarly deal in work periods. Premium crediting under those provisions occurs only on a *work-period* basis rather than an aggregate basis. See, *e.g.*, *Nolan* v. *City of Chicago*, 125 F. Supp. 2d 324, 331 (N.D. Ill. 2000) ("The Court holds the [premium] offsets should be calculated on a period by period basis.").

under a statutory assignment of authority from Congress, 29 U.S.C. 204, has long held that extra compensation under Section 207(h) may only be credited on a workweek or work-period basis:

> [S]urplus overtime premium payments, which may be credited against overtime pay pursuant to section 7(h) of [the] FLSA, *may not be carried forward or applied retroactively to satisfy an employer's overtime pay obligation in future or past pay periods.*

Department of Labor, *Wage-Hour Op. Letter No. 526*, 1985 WL 304329, at *9 (Dec. 23, 1985) (emphasis added). Wage-Hour Opinion letters from more than three decades ago are in accord. Where the relevant work period is 80 hours, those letters explain, "the extra compensation provided by [a] premium rate for such daily overtime hours may be credited, pursuant to section 7(h) of the Act, toward any overtime compensation payable under section 7(j) for hours worked in excess of 80 *in such period.*" *Opinion Letter No. 537*, [1966-1969 Transfer Binder] Wage-Hour Admin. Rulings (CCH) ¶ 30,524, at 41,922 (Dec. 2, 1966) (emphasis added); *Opinion Letter No. 540*, [1966-1969 Transfer Binder] Wage-Hour Admin. Rulings (CCH) ¶ 30,527, at 41,926 (Dec. 20, 1966) (same).[9] To the extent the statute is ambiguous, this consistent and informed position of the Department of Labor, now well over three decades old, is entitled to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944).

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[9] Section 7(j), 29 U.S.C. 207(j), is a statutory exception for hospital and related employment and allows for "a work period of fourteen consecutive days."

Third, the court of appeals correctly evaluated the legislative history of Section 207(h). That history suggests that Congress, when it enacted the current crediting provisions in 1949, was aware that the Department of Labor used a work-period standard for calculating overtime. See Pet. App. 14a (citing S. Rep. No. 402, 81st Cong., 1st Sess. 4 (1949)); see also *Roland Elec. Co.* v. *Black*, 163 F.2d 417, 420-421 (4th Cir. 1947) (relying on the "well settled construction that the Act takes as its standard a single workweek," and "the persuasiveness of administrative interpretation," in holding that "payments in excess of the amount required by the statute to an employee for work done in certain weeks do not relieve the employer from the obligation to compensate the employee for deficiencies in other weeks"), cert. denied, 333 U.S. 854 (1948). While the text of Section 207 changed the law to eliminate overtime on overtime, nothing in the text suggests an intent to displace the Labor Department's longstanding view that overtime must be calculated on a work-period basis. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974)) (footnotes omitted). That principle is of particular force where the legislative history expressly acknowledges the agency's construction.

Petitioner's argument to the contrary, which rests on a short-lived version of the credit provision (Pet. 18-19), is misplaced. The original version of the credit provision enacted in 1949 read: "[E]xtra compensation pro-

vided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward *any* premium compensation due him under this section for overtime work." Act of July 20, 1949, ch. 352, 63 Stat. 446 (emphasis added). As the court of appeals noted, however, later that same year Congress amended the FLSA and, among other changes, deleted the word "any" from the provision. The court below was correct to find that the deletion undermined petitioner's argument. Even if one could assume that the original premium-crediting provision possessed the meaning petitioner proposes by virtue of the "toward *any* premium" language—a dubious proposition from the outset—that meaning was surely altered when Congress excised the word "any."

Contrary to petitioner's claim (Pet. 19-20), the inference arising from that change is not a peculiar California-specific convention. To the contrary, it is widely employed. See, *e.g.*, 1A Norman J. Singer, *Sutherland Statutory Construction* § 22:29, at 264 (5th ed. 1993) ("When the statute is amended and words are omitted, the general rule of construction is to presume that the legislature intended the statute to have a different meaning than it had before the amendment."); see also *Stone* v. *INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."); *In re Bennett*, 338 F.2d 479, 484-485 (6th Cir. 1964) (applying "rule of statutory construction that an amendment to an existing statute is indicative of a legislative intent to change existing law"). In any event, there is no basis for petitioner's contention that "Congress made it clear that it intended no change

whatsoever to its earlier enacted crediting proviso." Pet. 19.[10]

Fourth, petitioner's interpretation of Section 207(h) could result in serious abuses, introduces significant anomalies, and belies common sense. Under the FLSA, an employer cannot average the number of hours worked over several weeks (much less two years) to avoid paying overtime. 29 C.F.R. 778.104 (giving example of 30 hours in one week and 50 hours in the next). For the same reason, an employer who pays above the statutory overtime requirement in one week pursuant to a contract (*e.g.*, double time for Sunday or holiday overtime) cannot pay less than the statutory requirement for overtime work in the next week. Under petitioner's theory, however, an employer could accomplish the same result by unlawfully withholding FLSA overtime payments earned by employees for an extended period of time—months or even years—and then seeking to offset against the FLSA overtime liability any contractual premiums paid during that extended period. Cf. Pet. App. 23a ("Were [petitioner's reading correct], then an employer who paid twice the minimum wage in one week would not owe anything the following week for the same number of hours worked."). Such a delay violates Section 207(a)(1)'s mandate that em-

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[10] The legislative history petitioner cites on the crediting issue (Pet. 19) is ambiguous at best. Moreover, petitioner never answers the contrary legislative history found in S. Rep. No. 402, 81st Cong., 1st Sess. 4 (1949). That report makes references to paragraphs 13, 69, and 70 of the Wage and Hour Interpretive Bulletin No. 4, which explicitly uses the workweek as the basis for its overtime computations. Yet the report nowhere suggests that Congress intended to eliminate the workweek as the fundamental unit for measuring both overtime payments and credits against such payments. See p. 18, *supra*.

ployers promptly pay overtime compensation and the establishment of the work period as the fundamental unit for pay calculation purposes. See 29 C.F.R. 778.106 ("The general rule is that overtime compensation earned in a particular workweek must be paid on the regular day for the period in which such workweek ends."); *Biggs* v. *Wilson*, 1 F.3d 1537, 1539, 1544 (9th Cir. 1993) (deeming unworkable any distinction between "late payment and nonpayment," and finding a delay of 14 days in the payment of wages owed under the statute to be a violation of the FLSA), cert. denied, 510 U.S. 1081 (1994).

For those very reasons, the only other court of appeals to have squarely considered this issue rejected the argument petitioner raises here. "Courts have long interpreted the FLSA as requiring that [FLSA overtime] payments be timely made. * * * Thus, the statute is violated even if the employer eventually pays the overtime amount that was due. * * * [Allowing premium payments to be carried forward or backwards to offset FLSA liability] would eviscerate the protection intended by the overtime payment requirement." *Howard*, 274 F.3d at 1148-1149. *Howard* thus ultimately reached the same conclusion as the court below: "premium pay credits should only offset overtime liabilities that accrued in the same time period." *Id.* at 1147.[11]

b. To support its contrary construction, petitioner relies principally on the verb tenses used in Section 207(h). Those tenses, petitioner asserts, necessarily allow employers to carry premium payments forward

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[11] The Seventh Circuit also correctly identified *Abbey*, *supra*, which has now been overruled, see note 2, *supra*, as the only contrary precedent on point. *Howard*, 274 F.3d at 1147-1148.

(or backward) indefinitely as a credit against FLSA overtime owed:

> If * * * extra compensation crediting can only occur within a workweek, and then only to the extent such crediting is equal to or lesser than that particular workweek's FLSA overtime compensation, Congress would have instead used a uniform past tense throughout the statute: "Extra compensation paid * * * shall be credited toward overtime compensation paid [as opposed to 'payable,' as the statute states]."

Pet. 17-18.

The court of appeals properly rejected that argument. For one thing, petitioner's proposed formulation —"extra compensation paid shall be credited toward overtime compensation paid"—is linguistically difficult, since it suggests providing a credit against an amount that has already been paid. Ordinarily, credits are provided against an amount that otherwise *should* or *must* be paid, not amounts already paid.

Further, contrary to petitioner's assumption, the term "payable" is not properly construed to mean an amount that will or may *become* payable at some other, future date. Instead, "payable" is typically understood to mean *currently* owed or due. Pet. App. 16a. "[W]hen used without qualification, the term [payable] normally means that the debt is payable at once, as opposed to 'owing.'" *Ibid.* (quoting *Black's Law Dictionary* 1128 (6th ed. 1990)) (emphasis omitted). Petitioner's argument based on verb tenses thus rests on the false assumption that the word "payable" connotes payments that will be owed or due in the future, after some other contingency occurs, rather than sums presently due under the FLSA for work performed.

Pet. App. 16a-17a. Petitioner's verb tense argument also ignores the fact that the statute refers to FLSA overtime "payable pursuant to this section." Because such overtime is "payable" on a work-period by work-period basis, the crediting occurs on that basis as well.

Petitioner's bare assertion (Pet. 10, 14) that the court of appeals' decision conflicts with *Christensen* v. *Harris County*, 529 U.S. 576 (2000), is likewise unpersuasive. *Christensen* addressed whether "the FLSA * * * prohibits a State or subdivision thereof from compelling employees to utilize accrued compensatory time." 529 U.S. at 582. The use of compensatory time is not at issue here. Nonetheless, citing only the penultimate sentence of *Christensen*—and none of the Court's other reasoning—petitioner apparently reads *Christensen* as resting solely on the absence of an express prohibition in the FLSA. See Pet. 14 (citing *Christensen*, 529 U.S. at 588).[12] The Court's opinion, however, carefully analyzed the text and structure of the Act to determine whether "the FLSA *implicitly* prohibits" the practice at issue, even after finding no *express* prohibition. 529 U.S. at 582 (emphasis added). The Court, moreover, declined to follow the Department of Labor's view (expressed in opinion letters) that the FLSA prohibited the practice, *id.* at 587, only after concluding that the Department's construction "would make little sense," *id.* at 586. Here, petitioner's methodology is implicitly or explicitly barred by the FLSA, and the Department of Labor's construction is eminently sensible.

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[12] In this case, moreover, petitioner did violate an express prohibition by withholding, for years on end, statutory overtime earned by its employees. The only question is how one calculates the obligation resulting from that breach.

It is, by contrast, petitioner's interpretation that "would make little sense." At bottom, petitioner's construction appears to rest on the implausible premise that Congress intended there to be *no* temporal limit on the ability of employers to carry extra pay forward or backward as a credit against FLSA overtime In petitioner's view, employers may effectively establish "running tabs" of FLSA liabilities and credits—offsetting premium payments and FLSA liabilities separated by years—subject to final settlement only when the employee leaves or sues.[13] The far more sensible view is that Congress expected FLSA obligations and premium pay credits to be offset on a work-period basis, which is how they accrue. Petitioner offers no persuasive evidence that Congress intended the contrary, counter-intuitive, result.

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[13] Indeed, petitioner's theory is hard to reconcile with the FLSA's ordinary two-year statute of limitations, which begins running at each regular pay day following the work period in which the overtime was not paid. 29 U.S.C. 255. Petitioner's theory suggests that an employee either could not file suit immediately following the failure to pay, because the employer might in the future claim a credit for extra premium compensation, or the employee would be able to sue immediately, but his damages might disappear upon the employer's payment of creditable extra compensation at a later date. Neither result makes sense. Instead, the violation occurs when the underpayment occurs, and credit can be claimed only for extra compensation paid for work done in the same period in which the FLSA liability accrues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

FABRI-CENTERS OF AMERICA, INC.,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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In order for this Court to side with the Secretary's briefed arguments it would have to hold:

- That when a federal circuit uses the word "any," it really means "some, but certainly not all." *See* Sect'y Brief in Opposition ("Opp.") at p. 12 ("It is highly doubtful that by using the phrase 'toward any overtime compensation due,' the court of appeals meant to rule that premium pay can be credited under an aggregate as opposed to work-period method");

- Congress' use of "shall" within a statute more properly connotes "maybe, but not necessarily." *But see, National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) (Congress' use of "shall" necessarily creates a right ". . . impervious to judicial discretion"); and

- This Court's decisions about how statutes are to be applied, read, and interpreted can be cast aside by simply distinguishing the particulars of the subject matter that spawned those opinions. *See*, Opp. at p. 23 ("*Christensen* addressed whether 'the FLSA . . . prohibits a State or subdivision thereof from compelling employees to utilize accrued compensatory time.' The use of compensatory time is not at issue here"). *But see, Christensen v. Harris Cty., Texas*, 529 U.S. 576, 588 (2000) ("Unless the FLSA *prohibits* respondents from adopting its policy, petitioners cannot show that [the employer] has violated the FLSA. And the FLSA contains no such prohibition").

Because these propositions are nothing short of astonishing, and all clearly wrong, the writ for certiorari should be granted.

The Secretary, like Petitioner, apparently concurs that the Sixth Circuit's published opinion is fraught with error. Opp. p. 9. While Petitioner challenges the correctness of the Sixth Circuit's statutory analysis and conclusions under the Fair Labor Standards Act ("FLSA"), the Secretary professes that the panel erred in declaring that there exists "divergent [circuit] case law" under 29 U.S.C. § 207(h). *Id.* As the Secretary necessarily concedes, both the majority and dissenting opinions of the Sixth Circuit announced that there does indeed exist circuit conflict over the proper interpretation and application of § 207(h), and that employers doing business in those conflicted circuits are free to apply and utilize the overtime compensation credits in a manner now prohibited only by the Seventh and Sixth Circuits. *See*, App. 19-20a, 26a (Clay, J., majority; Siler, SCJ., dissenting).[1] The Secretary's parsing of the identified circuit conflicts in *Alexander v. United States*, 32 F.3d 1571 (Fed. Cir. 1994) and *Kolheim v. Glynn County, Ga.*, 915 F.2d 1473 (11th Cir. 1990) (Opp. at pp. 8-14) misses the mark because it does nothing to eliminate the perception that circuit conflict does indeed exist. Whether

[1] The Secretary has no apparent quarrel with the fact that if indeed a circuit conflict exists with respect to application of § 207(h), that the dispute is one that should be settled by this Court in light of the national uniformity required of the FLSA. Nor does the Secretary dispute that the underlying nature of the issue presented in this petition – employer remittance of non-FLSA required premiums – is necessarily a recurring one in light of the several state statutes that compel such payments.

right or wrong, the Sixth Circuit sanctioned alternative FLSA pay practices by the federal government and employers doing business in the states of Georgia, Florida and Alabama. App. 19-20a.

Moreover, Respondent is wrong to suggest that no circuit conflict exists under § 207(h). While the Secretary charges that: "It is highly doubtful that, by using the phrase 'toward any overtime compensation due,' the court of appeals [in *Alexander*] meant to rule that premium pay can be credited under an aggregate as opposed to work-period method" (Opp. p. 12), she later concedes just that point (Opp. at p. 19). To prop up her Congressional amendment straw man, the Secretary is forced to concede the original section 207(h), and its "toward *any* [FLSA] premium compensation due" proviso was highly suggestive of a crediting right un-cabined by workweek or work period qualifiers. Opp. p. 19. Like the Secretary, the Sixth Circuit similarly felt that "any" means just that. App. 13a. Accordingly, both the majority and dissenting opinions below were quite correct in announcing that their opinion and that of the Seventh Circuit in *Howard v. City of Springfield*, 274 F.3d 1141 (7th Cir. 2001) represent "divergent case law" in an area where there is "silence in the statute" and a "lack of an implementing [administrative] regulation." App. 19a.

The Secretary is equally wrong in proclaiming that her construction of the FLSA ". . . is strongly supported by the text and structure of the Act." Opp. p. 15. The Secretary's brief is conspicuous in its failure to even mention the obligatory "shall" which appears in the text of section 207(h):

> Extra compensation paid as described in paragraphs (5), (6) and (7) of subsection (e) of this section *shall be creditable* toward overtime compensation payable pursuant to this section.

29 U.S.C. § 207(h)(2), Pub. L. 393 (1949) (emphasis added). Whatever interpretive maxims are summoned forth by the Secretary, or whatever tortured meanings are ascribed to the words "paid," "creditable," and "payable," the Secretary's construction necessarily leads to a result wherein the compulsory "shall" is morphed into "shall not." If an employer's remitted premiums exceed the workweek's FLSA obligations for an employee, they then "shall not" be creditable under § 207(h). By the same token, if the worker does not engage in FLSA overtime within a workweek, remitted premiums "shall not" be creditable at all. *But see, Barnhart v. Peabody Coal Co.*, 123 S.Ct. 748 (2003) (THOMAS, J., dissenting) ("If Congress desires for this Court to give 'shall' a non-mandatory meaning, it must say so explicitly by specifying the consequences for non-compliance or explicitly defining the term 'shall' to mean something other than a mandatory directive"). *See also, National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) (Congress' use of "shall" is best understood to create a right ". . . impervious to judicial discretion").

The Secretary also ignores the statute's past tense "paid." Because premiums are not "paid" until actually received, they logically and practically cannot be offset only against FLSA overtime earnings included in the same paycheck. Once the employee possesses premium pay, it can only be truly offset through subsequent paychecks, remitted for later occurring workweeks. Nor does Respondent explain why Congress would use "paid" in reference to offsetable premiums, but "payable" in reference to

overtime pay, if it meant to connote the very same concept: "[Amounts] *currently* owed or due;" "sums presently due." Opp. p. 20. *But see*, *Scott v. Brink's, Inc.*, 962 F.2d 225, 227 (2nd Cir. 1992) ("In common usage 'paid' does not mean 'payable'").

The Secretary's parade of "serious abuses" and "significant anomalies" (Opp. p. 20) is the same type of erroneous, misguided, Henny-Penny rationale invoked by the Seventh Circuit majority to bolster the fractured decision in *Howard v. City of Springfield*, 274 F.3d 1141, 1149 (7th Cir. 2001). The short answer to all of this is that the hypothetical "abuses" are plainly unobtainable under the FLSA. An employer cannot ". . . withhold [ ] FLSA overtime payments earned by employees for an extended period of time – months or even years – and then seek [ ] to offset against the FLSA overtime liability any contractual premiums paid during that extended period." Opp. p. 20. As the Secretary herself notes (Opp. p. 20), and as the FLSA statute makes quite clear, such an imaginary scenario is "unlawful." *See also*, 29 U.S.C. § 207(a)(1); 29 C.F.R. § 778.106. Rather, the only result that an employer could obtain while operating under the *Kolheim* and *Alexander* approaches to section 207(h) is a fronting or advancement of extra compensation premiums to employees subject to subsequent overtime crediting. Holding off the remittance of workweek or work period FLSA overtime payments in contemplation of future occurring premiums is plainly illegal, and no one has suggested otherwise.

To the extent the Secretary now posits that she has always held a "consistent and informed position" with respect to crediting under § 207(h) (Opp. p. 17), Petitioner would point out that this bedrock of self-generated administrative precedent was not once cited or referenced

to the District Court by the Secretary or her counsels. The dusty opinion letters to which some measure of judicial deference is now urged were not even unearthed by the Secretary until this dispute was briefed to the Sixth Circuit panel. Moreover, the Secretary's purportedly "long-held" opinion letters are completely barren of any articulated rationale or reasoning.[2] Rather, they represent nothing short of an edict, unadorned by logic or analysis, which under this Court's teachings warrant no deference whatsoever, be it *Skidmore*[3] or *Chevron*.[4] *See, United States v. Mead Corp.*, 533 U.S. 218 (2001) (agency opinion letters with "little or no reasoning" warrant no deference). *See also, General Electric Corp. v. Gilbert*, 429 U.S. 125, 142 (1976) (courts look hard at the "'thoroughness evidenced in [the agency's] consideration'").

The Secretary's argument that other ". . . provisions of the FLSA make clear that the workweek or work period is the applicable period" (Opp. p. 15) proves too much. Congress surely knows how to limit FLSA requirements by a "workweek" or "work period." As the Secretary correctly notes, the statute is replete with such examples. Opp. p. 15. Thus, the Sixth Circuit was quite right to point out: "[W]here Congress includes particular language in one

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[2] The opinion letters tardily located by the Secretary are Wage-Hour Op. Letter WH-526 (1985); Wage-Hour Op. Letter WH-537 (1966); and Wage-Hour Op. Letter WH-540 (1966). To the extent these letters even remotely touch upon permissible crediting under section 207(h), they offer no rationale, and are thus void of any "power to persuade." *Christensen v. Harris Cty., Texas*, 529 U.S. 576, 587 (2000).

[3] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[4] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." App. 15a (quoting, *Russello v. United States*, 464 U.S. 16, 23-24 (1983)). *Accord, Marshall v. Western Union Tele. Co.*, 621 F.2d 1246, 1251 (3rd Cir. 1980) ("The careful inclusion of the workweek standard in one subsection of the [FLSA] and its exclusion in the other . . . indicates the exclusion was intentional. Under the usual canons of statutory construction, where Congress . . . has carefully employed a term in one place and excluded it in another, it should not be implied where excluded"). Unlike other FLSA sections, section 207(h) contains no workweek or work period qualifiers.

Finally, the Secretary's treatment of *Christensen v. Harris Cty., Texas*, 529 U.S. 576 (2000) (Opp. at p. 23) is both superficial and frankly a bit naive. It is true that *Christensen* directly implicated the "use of compensatory time" under the FLSA, and also true that compensatory time "is not at issue here." *Id.* But *Christensen* also pointed out that for decades the Secretary has been misreading how the FLSA operates, and how it is to be applied. *Christensen*, 529 U.S. at 588. Instead of employers having to exhaustively pick apart the statute to find justification for their actions, it is the Secretary who must be able to cite to a particular statutory prohibition. *Christensen v. Harris Cty., Texas*, 529 U.S. 576, 588 (2000) ("Unless the FLSA *prohibits* respondents from adopting its policy, petitioners cannot show that [the employer] has violated the FLSA. And the FLSA contains no such prohibition"). The Secretary's cursory treatment of *Christensen* here only confirms her intent to continue to read the FLSA

"exactly backwards,"[5] notwithstanding this Court's contrary directive.

Christensen has been invoked far outside the "compensatory time" setting to which the Secretary would banish its principles. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) (EEO principles under Title VII); *United States v. Mead Corp.*, 533 U.S. 218 (2001) (Customs Service regulations); *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2000) (EPA setting); *League of Wilderness Def. v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) (Forest Service setting); *South Shore Hosp. v. Thompson*, 308 F.3d 91 (1st Cir. 2002) (Medicare setting). Here, Petitioner seeks only to apply *Christensen's* rationale to the same FLSA statute in which it had its origins. And, this would not be the first time that an administrative agency struggled to avoid this Court's rulings by disingenuously pruning the reach of one of its opinions. *See, NLRB v. Kentucky River Comm. Care, Inc.*, 532 U.S. 706, 716 (2001) ("The Board's [interpretation] . . . is particularly troubling because just seven years ago we rejected the Board's interpretation").

In the end, this petition poses a question of pure statutory construction, against an undisputed factual background, with respect to a statutory provision that has been in existence for more than fifty years without the benefit of this Court's counsel, in an area of federal law that is now experiencing litigation explosion. Tnat the appellate panel confirmed the existence of circuit conflict, and ignored several broad-based interpretive canons and

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[5] *Christensen v. Harris Cty, Texas*, 529 U.S. 576, 588 (2000).

FLSA substantive decisions by this Court only further heightens the need for certiorari.

For the foregoing reasons, and those set forth in the petition, a petition for writ of certiorari should be granted.

Respectfully submitted,

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